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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARK A. HUMPHREY AND FREDD J. HAAS
d/b/a HUMPHREY & HAAS,
Appellants,

v.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT
OF THE IOWA STATE BAR ASSOCIATION,
Appellee.

On Appeal from a Judgment of the Iowa Supreme Court

JURISDICTIONAL STATEMENT

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28 pp

QUESTIONS PRESENTED

1. Whether a state law restricting television advertising by lawyers to displays of words and numbers, accompanied only by a single "nondramatic" voice, violates the First Amendment, on its face and as applied.

2. Whether a state law forbidding lawyers to communicate truthful, non-deceptive information unless "specifically permitted" by rule violates the First Amendment, on its face and as applied.

3. Whether a state law banning the use of "dramatic" voices and "self-laudatory" statements in lawyer advertising is impermissibly vague or otherwise violates the First Amendment, on its face or as applied.

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Appellee.

On Appeal from a Judgment of the Iowa Supreme Court

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Iowa Supreme Court is reported at 355 N.W.2d 565 and appears as Appendix A. (App. 1a-24a.)

JURISDICTION

The proceeding below was brought as an original action in the Iowa Supreme Court to enjoin appellants Humphrey and Haas, two Iowa lawyers, from airing certain television advertisements alleged to violate two rules of the Iowa Code of Professional Responsibility for

Lawyers, DR 2-101 and DR 2-105. Finding that the ads in question violated the rules, the Iowa Supreme Court permanently enjoined Humphrey and Haas from airing them or any other ads that violate those rules. The court rejected their contention that the rules, both on their face and as applied, violate the First and Fourteenth Amendments. (App. 1a.)

The Iowa Supreme Court's judgment, embodied in its opinion, was issued on September 19, 1984. (App. 1a.) A notice of appeal was timely filed on November 19, 1984. (App. 25a.) By an order of December 6, 1984, the time for docketing the appeal was extended to January 17, 1985. (App. 27a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2).[1] Because appellee is a commission of the Iowa Supreme Court (see Iowa Court Rule 118.2), we believe that 28 U.S.C. § 2403(b) is inapplicable. See Sup. Ct. R. 28.4(c).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U.S. Const., Amend. I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

U.S. Const., Amend. XIV, § 1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

DR 2-101 and DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers are set forth in Appendix D (App. 28a-40a).

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[1] Insofar as any subsidiary questions presented may properly be here on certiorari, this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3), and we ask that the notation of probable jurisdiction "be understood as a grant of the writ" on them. *Mishkin* v. *New York*, 383 U.S. 502, 512 (1966); *Gomez* v. *Perez*, 409 U.S. 535, 537 n.2 (1973).

STATEMENT OF THE CASE

1. The Advertisements

Over a three-day period in early September 1982, the law firm of Humphrey, Haas & Gritzner aired three advertisements over WHO-TV in Des Moines, Iowa. The first ad featured an actor and actress portraying a physician and a nurse in an examination room. While the nurse looked at an X-ray, the doctor addressed the viewer:

> "We see first-hand injuries caused by the neglect of others. If you're seriously injured through the negligence of others, you should be talking to a lawyer. The choice of a lawyer could be important. That's something to think about."

The second ad featured an actor portraying a printer. Standing in front of a printing press, he addressed the viewer:

> "I suffered loss of wages, incurred staggering medical bills and endured pain and suffering all through the negligence of others. I wasn't aware of my legal rights. I should have been talking to a lawyer."

The third ad featured two actors portraying bowling partners. The following conversation took place at the lanes:

> "Bowler #1: I've got to throw like that body, we're one man short.
>
> Bowler #2: He was injured through the negligence of others.
>
> Bowler #1: He should be talking to a lawyer.
>
> Bowler #2: The choice of that lawyer will be important.
>
> Bowler #1: That's something to think about."

After the dramatization, the scene in each ad shifted to the reception area of a law office, with an actress

portraying a receptionist. As the name, address, and phone number of the firm were superimposed on this picture, an off-camera announcer said:

> "If you're injured through the negligence of others, call the law firm of Humphrey, Haas & Gritzner. Cases involving auto accidents, work comp, serious personal injuries and wrongful death handled on a percentage basis. No charge for the initial consultation. Call now at 288-0102."

2. The Complaint and Answer

The three ads were scheduled to run four days a week for 47 weeks. (Tr. 25.)[2] After three days on the air, however, they were discontinued by the station at the request of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. (Tr. 29.)[3] The Committee then brought an original action in the Iowa Supreme Court, alleging that the three ads violated DR 2-101 and DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers. The Committee alleged that the ads violated DR 2-101 because they

> "contain more than a single nondramatic voice, have background sound and visual displays of two or more people characterizing themselves as clients which make laudatory comments as to Defendants' services." (App. 42a.)[4]

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[2] "Tr." refers to the transcript of the evidentiary hearing ordered by the Iowa Supreme Court in this case. See pp. 6-9, below.

[3] The Committee consists of two members appointed by the Iowa Supreme Court and five appointed by the Iowa State Bar Association. All seven must be confirmed by the Iowa Supreme Court. The Committee members sit as commissioners of that court "to initiate or receive, and process complaints against any attorney licensed to practice law in [Iowa] for alleged violations of the Iowa Code of Professional Responsibility for Lawyers and the laws of the United States or the state of Iowa." Iowa Court Rule 118.2.

[4] DR 2-101(B), which lists information that "may be communicated to the public," provides that the approved information may be communicated on television—

The Committee alleged that the ads violated DR 2-105, which, at the time, authorized lawyers in print advertisements to list not more than three fields of practice and required such listings to be accompanied by a disclaimer of expertise. (App. 42a.)[5]

The Committee asked that the Iowa Supreme Court permanently enjoin the lawyers from airing the ads in question or any other ads that violate the Code. (App. 43a-44a.) On September 14, 1982, the Iowa Supreme Court, on the Committee's *ex parte* application, enjoined Humphrey and Haas from airing their ads pending further proceedings. (App. 51a-52a.)[6]

Humphrey and Haas admitted that the ads used more than a single voice and contained background sounds and visual displays. But they urged that DR 2-101's restrictions of lawyer advertising violate the First and Four-

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"in words and numbers only, articulated only by a single nondramatic voice, not that of a lawyer, and with no other background sound. . . . [N]o visual display shall be allowed except that allowed in print as articulated by the announcer." (App. 29a.)

DR 2-101(A) limits lawyer advertising to the information "specifically permitted" by the rule. It bans any "false, fraudulent, misleading, deceptive or unfair statements." (App. 28a.)

[5] After its judgment here was entered, the Iowa Supreme Court amended DR 2-105(A)(2) to permit the listing of fields of practice in broadcast as well as print advertising. (See App. 36a-38a.) The amended rule violates the First Amendment because it arbitrarily limits to three the number of fields of practice that may be listed in any advertisement and impermissibly restricts the designations that may be used. (See pp. 16-17, below.) Its required disclaimer (see App. 39a) is unjustifiably burdensome as well.

[6] After the Committee commenced its action, Gritzner withdrew from the firm and was dismissed as a defendant. Meanwhile, the Committee instituted disciplinary proceedings against Humphrey and Haas, which have been stayed pending disposition of this action. Committee on Professional Ethics and Conduct, *In re Humphrey and Haas*, File No. 8283-53 (notice of complaint issued Sept. 16, 1982).

teenth Amendments, both facially and as applied, and that the rule's ban on the use of "dramatic" voices and "self-laudatory" statements is impermissibly vague. They contended that DR 2-105 also violates the First and Fourteenth Amendments, facially and as applied. Alleging that the disciplinary rules violated their constitutional rights, they counterclaimed for declaratory and injunctive relief. (App. 46a-50a.)

3. The Evidentiary Hearing

Two weeks after the Iowa Supreme Court entered the *ex parte* injunction, it appointed a commissioner to conduct an evidentiary hearing and to prepare a written summary of the evidence, but not to make any findings of fact or reach any conclusions of law. (App. 53a.) Following discovery, the hearing was held, and the Commissioner's summary was filed with the court on November 16, 1983. (App. 55a.) The evidentiary hearing focused entirely on the state's justification for DR 2-101's general prohibition of dramatization in lawyer advertising on television, and on the supposedly objectionable characteristics of the three ads.

The Committee's principal justification for DR 2-101's prohibition was that dramatizations may appeal to a viewer's "emotions," interfering with "rational" choice, and are "unnecessary" to convey pertinent information. Former Justice Robert Allbee, a witness for the Committee, explained that the likely viewers of such advertising "are ordinarily of a lower intellectual category and they are less able to make an objective conclusion from something that is passed by them in dramatic form." (Tr. 95.)[7]

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[7] Former Justice Allbee was a member of the Iowa Supreme Court when it adopted the ban on dramatized television advertising in 1980 on the Committee's recommendation. In addition to "prevent[ing] purely emotional reactions or emotional impact in the selection of lawyers" (Tr. 86-87), Justice Allbee testified that the

The Committee made no claim that the ads were in fact false, deceptive, or misleading. To the contrary, Dr. Richard Haynes, an expert retained by the Committee, testified that he saw nothing inherently misleading or deceptive in the use of dramatization (Tr. 210-12; see App. 61a), and that the ads in question had not been perceived as misleading or deceptive by a group of viewers paid by him to watch them. (Tr. 210, 258; see App. 60a.) He conceded that dramatization is effective precisely because it "involve[s] and interest[s] the viewer" (Tr. 276); indeed, he found that 75 percent of the viewers paid to watch the ads rated them as a fair-to-excellent way of educating viewers about their rights. (Tr. 265.)

The Committee's counsel repeatedly sought to elicit testimony that dramatization in television advertising can generate an exaggerated sense of need for a lawyer's services, and can imply distinctions between lawyers that are no more genuine than the distinctions between name-brand and generic aspirin. But none of the evidence suggested that any such effects are either inherent in or peculiar to dramatized television advertising. Nor was there any evidence that the ads here caused such effects or that such effects, if they were to occur, would contaminate consumer choice. The defense proffered extensive testimony that lawyer advertising does not create a need for legal services and that a consumer's exercise of choice is inevitably more deliberate in hiring a lawyer than in purchasing bathroom tissue.[8]

The Committee did not controvert the extensive defense evidence that dramatization is critical for effective television advertising. The evidence demonstrated, to the

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ban was intended "to guard the public against deception either inadvertent or intended, and in turn to protect the trust and integrity that we want the public to have in the legal profession. That the public not obtain the view that merchandising legal services is like merchandising vintage wine." (Tr. 87; see App. 59a.)

[8] *E.g.*, Tr. 335, 618-19, 699.

contrary, that dramatization enables advertisers to capture viewers' attention,[9] causes viewers to remember the message being conveyed,[10] and "break[s] down the barrier that exists between the public and lawyers." [11] The Committee offered no evidence to rebut the testimony of defense witnesses that ads conforming to the restrictions of DR 2-101 are *more* likely to mislead viewers than dramatized ads precisely because they look *less* like ads than those employing dramatization.[12] As one defense witness stated, ads conforming to DR 2-101—just printed words and numbers on the screen, accompanied by a "nondramatic" voice—could readily be perceived as a public-service announcement, "a statement with some sort of authority behind it." [13]

Lori Andrews, research attorney for the American Bar Foundation and former staff director of the ABA Commission on Advertising, testified that more than 40 states permit lawyer advertising on television using dramatization, visual displays, background sounds, and the like. (Tr. 330-31; see App. 61a.) She pointed out that DR 2-101 contains independent prohibitions against false, de-

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[9] *E.g.*, Tr. 378, 562, 686.

[10] *E.g.*, Tr. 281, 379, 712.

[11] Tr. 457. See also, *e.g.*, Tr. 709-10. As Norton Frickey, who heads the firm that produced the ads, testified in explaining their design, "we try to find something that the average guy can communicate with and relate to[.]" (Tr. 451; see App. 63a.)

[12] *E.g.*, Tr. 688, 690, 754.

[13] Tr. 691. The witness observed:

> "[T]hat has a greater chance to mislead the public than something which has drama, which has action, which has visuals and color in it that everybody knows it's an advertisement. When I see it, I know it's an ad. If I see this other thing, I might think that could be anything from a newscast to a message from the Bar."

Id. (testimony of Dr. Gene W. Murdock, Assistant Professor of Business Administration, University of Wyoming).

ceptive, and misleading statements or claims (Tr. 334), and she noted that the trend is simply to forbid such statements or claims and to permit ads of the type aired in this case. (Tr. 332; see App. 62a.)[14]

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[14] As of January 1985, only five states—Alabama, New Jersey, Ohio, Vermont, and West Virginia—imposed restrictions on television advertising by lawyers comparable to Iowa's or more severe. See Ala. DR 2-102(A)(7)(d); N.J. Rule 7.2; Ohio DR 2-101(B); Vt. DR 2-101(D); W. Va. DR 2-101(B). Indiana proscribes advertisements containing "a photograph or other pictorial representation of any person other than the attorney or member of the firm," Ind. DR 2-101(D)(4), while Montana permits television ads only with the advance approval of the state bar association's Ethics Committee. See Mont. DR 2-101(C) (as construed).

Rule 7.2(a) of the ABA's Model Rules of Professional Conduct (adopted in August 1983) permits lawyer advertising through any public media, including television, subject only to the restriction that the advertising not be false or misleading. The Comment on the Rule states:

> "Television is now one of the most powerful media for getting information to the public, particularly persons of low or moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant."

ABA's Model Rules of Professional Conduct, *reprinted in* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, p. 01:166 (1984). DR 2-101(B) of the ABA's Model Code of Professional Responsibility also permitted lawyer advertising on television, without special restrictions based on the lawyer's choice of medium. See *id.* at p. 01:310.

In November 1984, the Staff of the FTC's Cleveland Regional Office and the FTC's Bureau of Economics issued a report concluding that content-based and media-based restrictions on lawyer advertising inhibit the extent of advertising and result in significantly higher prices for legal services. *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* 126-27 (Nov. 1984). The report, based on

4. The Decision

On the basis of this record, the Iowa Supreme Court sustained the restrictions sought to be enforced by the Committee and enjoined Humphrey and Haas from airing the ads in question. Disclaiming any suggestion "that the advertisements here were deceitful" (App. 11a), the court justified its injunction on the ground that, "in the medium defendants chose, the public could well be misled by [the ads]." (*Id.*) The court did not identify any feature of "the medium defendants chose" that rendered any particular aspect of any of the ads potentially misleading.[15]

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an empirical study of the effects of lawyer advertising restrictions in 17 representative states, urges elimination of all restrictions that limit "the free flow of truthful information to consumers." *Id.* at 172. Its recommended approach is even less restrictive than the ABA's Model Rule 7.2. See *id.* at 150-53.

The Federal Trade Commission, in its *amicus* brief in the Iowa Supreme Court, argued that the restrictions at issue in this case "are likely to diminish the effectiveness with which attorneys can [truthfully] inform consumers about the availability of legal services." FTC *amicus* brief at 14. It stated that "in addition to the complete absence of evidence to suggest that the advertisements in question were misleading or deceptive, there is no evidence in the record to support the premise generally that the technique of using dramatizations, background sounds or more than one non-dramatic voice in a television advertisement for lawyer services would be inherently misleading." *Id.* at 15. The FTC stated that "[t]he use of dramatizations containing characterizations, visual displays and background sound can provide a truthful, non-deceptive and effective means of conveying important information about legal rights and the availability and cost of legal services." *Id.* See also *id.* at 17.

[15] The court seemed to accept the Committee's assertion, made for the first time in its brief but without support in the evidentiary record, that the ads could "mislead people into believing that pursuing the listed cases is a cost-free venture." (App. 11a.) The court also seemed to accept the Committee's claim, also made for the first time in its brief but without any support in the evidentiary record, that the ads might be misleading because they implied

The court rejected Humphrey and Haas's contention that DR 2-101's ban on dramatization is more restrictive than necessary to serve any compelling state interest. "All that is prohibited," the court stated, "are the tools which would manipulate the viewer's mind and will." (App. 13a.) Stating that the situation presented by the ads "is exactly what the United States supreme court had in mind when it referred to the 'special problems' in electronic media advertising" (App. 11a), the Iowa court justified DR 2-101's ban on dramatization as a prophylactic against "intrusion, intimidation, overreaching, or undue influence." (App. 12a.)

The court agreed with the Committee that "the *Bates* rationale does not apply to irrelevant information," and opined that "the ads here would not aid the public in making the informed decision which is subject to the protection recognized in *Bates*." (*Id.*) Because DR 2-101's restriction prohibits only "irrelevant" information, the court found that the rule "does not impede, [but] in fact advances, the fostering of rational decision making and maintaining of the bar's professionalism." (*Id.*)

The court summarily dismissed Humphrey and Haas's claim that the limitation on lawyer advertising to information "specifically permitted" by rule violates the First Amendment. "We specifically allow[ ] dissemination of all information necessary to assist the public in seeking and selecting counsel. As previously mentioned, a procedure is in place for considering any suggested additions of useful information." (App. 13a.) Finally, the court rejected the contention that DR 2-101's ban on "dramatic" voices and "self-laudatory" statements is impermissibly vague. It did so merely by remarking that the phrase "nondramatic voice" is "a

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that Humphrey and Haas were more experienced than they in fact were. (*Id.*) The court did not explain how "the medium defendants chose" was responsible for either supposed misrepresentation, or on what basis the court accepted the Committee's claims.

simple [one] which we think is commonly understood" (App. 14a), and noting simply that "[t]he dictionary meaning of 'laudatory' is 'expressing praise.' " (*Id.*)

Two justices dissented, condemning the rule as "unnecessarily restrictive because it prohibits dissemination of basic information necessary for an informed judgment about the selection of an attorney and the protection of basic legal rights." (App. 15a.) They added that the rule's ban on dramatization is "in fact a prescription for dullness, prohibiting all background music, dramatization, and other methods of stimulating viewer interest." (*Id.*) The dissent stated:

> "It is undisputed that the effect of these limitations on technique is to substantially diminish the effectiveness of any television advertising. The combined effect of the rules is to inhibit dissemination of relevant information without a showing of a substantial state interest. This violates . . . the first amendment." (*Id.*)

The dissent stressed that the Committee's own expert had testified that dramatization is not inherently misleading, and that the ads in fact were not misleading to the survey group. (App. 16a.) The dissenters rejected the majority's conclusion that "because television is the medium, a mere *chance* of deceit is sufficient" to sustain the restrictions at issue. (App. 17a.) They instead read this Court's cases as teaching that "regardless of the medium used, advertising must be more than 'possibly' misleading in order to be denied first amendment protection." (App. 17a-18a.)

The dissent pointed out that this Court's statements recognizing the value of fostering rational, intelligent, and voluntary decisionmaking were meant "to expand the scope of lawyer advertising, not to throttle it." (App. 21a.) "In providing information for the formation of an informed judgment," Justice Larson wrote, "it seems

to me that it is preferable to provide an excess of information, rather than too little. Viewers are sophisticated enough to accept or reject it as they see fit." (App. 22a.)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The Ban on Dramatization

In sustaining DR 2-101's restriction on lawyer advertising on television to pictures of printed words and numbers, accompanied only by an off-screen "nondramatic" voice, the Iowa court disobeyed the teachings of this Court's lawyer advertising cases, *In re R.M.J.*, 455 U.S. 191 (1982); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Bates* v. *State Bar*, 433 U.S. 350 (1977). Those cases teach that a state may impose restrictions on lawyer advertising "where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." *In re R.M.J.*, *supra*, 455 U.S. at 202.

Although a state may restrict such advertising to prevent "fraud, undue influence, intimidation, overreaching and other forms of 'vexatious conduct,'" *id.*, such restrictions "must be narrowly drawn and the State may regulate only to the extent regulation furthers the State's substantial interest." *Id.* at 203. And, as with restrictions on other forms of speech, "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger* v. *Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2882 n.20 (1983). The Court has sustained prophylactic restrictions only in situations which are "inherently conducive to overreaching and other forms of misconduct," *Ohralik*, *supra*, 436 U.S. at 464, where requiring proof of actual harm would render a lawyer's conduct "virtually immune to effective oversight and regulation by the State or by the legal profession." *Id.* at 466.

There is no claim that the ads here were false, misleading, or deceptive. To the contrary, the Committee's expert witness specifically testified that the ads were not in fact misleading or deceptive, and the Iowa Supreme Court itself disclaimed any suggestion "that the advertisements here were deceitful." [16] Thus, the question presented is whether the state may enforce a prophylactic rule to enjoin Humphrey and Haas from airing *these* ads on the theory that *other* dramatized television ads by lawyers *might* be deceptive.

The First Amendment permits no such prophylactic rule here. The Committee's expert witness himself testified that he found nothing inherently misleading or deceptive in the use of dramatization, and he conceded that dramatization is effective in television advertising precisely because it "involve[s] and interest[s] the viewer." The Iowa Supreme Court offered no record support for any contrary view. It upheld DR 2-101's prohibition solely on the basis of its unsubstantiated belief that television dramatization "manipulate[s] the viewer's mind and will," despite this Court's admonition that "commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.'" *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 92 n.6 (1977).

The Iowa court may have upheld DR 2-101 on the supposition that the likely viewers of lawyer advertising on television "are ordinarily of a lower intellectual category and [thus] less able to make an objective conclusion from something that is passed by them in dramatic form." (See p. 6 & n.7, above.) But this Court has squarely rejected restrictions premised on the assumption "that the public is not sophisticated enough to realize the limitations of advertising." *Bates, supra*, 433 U.S. at 375. It

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[16] As for the court's view that the ads *might* be misleading in certain respects because of "the medium defendants chose" (App. 11a), see pp. 17-19, below.

has refused to restrict lawyer advertising when the restriction "rests on an underestimation of the public." *Id.* "If the naïveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in the proper perspective." *Id.*

Nor is there any foundation in the First Amendment for distinguishing between speech that appeals to the "emotions" and speech that appeals to "reason." As the evidence in this case demonstrates, drama can facilitate effective communication by capturing a viewer's attention through a sympathetic appeal to the viewer's needs —an approach that the Iowa court condemned as manipulative—while dry recitations of fact can generate irrational emotional responses. Moreover, as the evidence showed, viewers may be more easily misled by advertising that purports to be "objective" than by advertising that makes no secret of its commercial aims.

This Court has already held that any distinction between speech that informs and speech that persuades is analytically indefensible. *Thomas* v. *Collins*, 323 U.S. 516, 535 (1945). See also *Primus*, *supra*, 436 U.S. at 431-32. And the Court has frequently stressed that the fact that speech may persuade "is hardly a reason to suppress it." *First National Bank* v. *Bellotti*, 435 U.S. 765, 790 (1978); *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S. 684, 689 (1959). The Iowa Supreme Court believed that DR 2-101 draws a permissible line "between what informs the public and what promotes the lawyer," but the rule is in fact "a prescription for dullness," and its effect is "to inhibit dissemination of relevant information without a showing of substantial state interest." (See p. 12, above.) Because television is such a critical medium of communication, and because DR 2-101 so drastically restricts the use of that medium, the First

Amendment question presented here is urgent and important.

B. The Ban on Information Not "Specifically Permitted"

1. *Truthful, Non-Deceptive Information May Not Be Suppressed*

In enjoining Humphrey and Haas from airing television ads that communicate truthful, non-deceptive information not "specifically permitted" to be conveyed, the Iowa Supreme Court disregarded this Court's teaching that such restrictions are flatly impermissible. Indeed, like DR 2-105(A)(2), one of the rules at issue in *R.M.J.* limited the fields of practice that a lawyer might list. The lawyer in that case was charged, *inter alia*, with publishing ads that listed fields other than those permitted by the Advisory Committee of the Missouri Supreme Court, but the Advisory Committee was unable to suggest any substantial interest promoted by the limitation. This Court concluded that the limitation was "an invalid restriction upon speech as applied to [the lawyer's] advertisement." 455 U.S. at 205.

Here neither the Committee nor the Iowa court has suggested any substantial interest promoted by the rule's prohibition against communicating truthful, non-deceptive information not "specifically permitted" by rule. The only asserted justification for this approach is that the rule permits all "relevant" information to be conveyed; but the rule precludes lawyers from advertising information that is indisputably "relevant"[17]; and in any event the state has no substantial interest in suppressing "irrelevant" information. It is the very essence of paternalism for the state to decide what a consumer "needs to know" to make an informed decision. As the ABA has

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[17] As the dissent observed, the Iowa rules do not permit lawyers to include in their advertisements "such matters as statutes of limitation, the early filing requirements of [Iowa's] tort claims act, and the problems of uninformed releases of claims." (App. 22a.)

observed, moreover, there is no reason to suppose "that the bar can accurately forecast the kind of information that the public would regard as relevant." (See p. 9, n.14, above.)[18]

Because the rule is both irrational and contrary to this Court's decisions, the Iowa court's judgment upholding and enforcing it should not be allowed to stand.

2. *The Ads Here Were Not Potentially Misleading*

Humphrey and Haas also seek review of the Iowa court's conclusion that, "in the medium defendants chose," their ads were potentially misleading with respect to fees and quality of service. *First*, the court offered no support for its conclusion that the ads might "mislead people into believing that pursuing the listed cases is a cost-free venture" (App. 11a), nor any explanation for its view that *television* was responsible for this supposed deception. Moreover, as the dissent observed (App. 19a-20a), the Iowa rules themselves do not "require disclaimers or explanations to avoid false hopes," *R.M.J.*, *supra*, 455 U.S. at 200 n.11, where percentage rates are advertised. With respect to any apprehension that the ads were potentially misleading, "we deal with a silent record." *Id.* at 206.[19] For the Iowa court to enjoin the ads as potentially misleading on this ground violated the First Amendment.

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[18] To the extent that the Iowa court's holding rested on the supposition that some members of the audience might be irritated by dramatized ads, such a supposition could not support the challenged restriction. Viewers who encounter ads they dislike "may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.' " *Consolidated Edison Co.* v. *PSC*, 447 U.S. 530, 542 (1980) (citation omitted); *Bolger*, *supra*, 103 S. Ct. at 2883. They may leave the room, change the channel, shut off the volume, or turn off the set.

[19] As the dissent observed, "any lack of understanding about this matter, or any other matter relevant to the terms of a lawyer's employment, would logically be resolved at the initial conference, which, in this case, was advertised as being free of cost." (App. 20a.) See *Bates*, *supra*, 433 U.S. at 373 n.28.

Second, nothing in the ads overstated Humphrey and Haas's qualifications in the fields of practice they listed, and the Iowa court did not explain how they did. At most, the ads implied that they *were* qualified in those fields, and, as the dissent noted, "there is no evidence, nor even a claim, that they were in fact not qualified." (App. 20a.)[20] Offering no discussion, the majority merely speculated that—because of "the medium defendants chose"—viewers might think Humphrey and Haas more able than they are. (App. 11a.) Its conclusion that the ads were potentially misleading in this respect was wholly unsupported, and to enjoin the ads on this ground violated the First Amendment.[21]

Third, wholly apart from the First Amendment obstacles to the Iowa court's conclusion that the ads were potentially misleading, it plainly violated due process for the court to enjoin them on this ground. The Committee's complaint did not allege that the ads were misleading in any respect, and it presented no evidence on these matters at the hearing before the commissioner. It first raised these claims in its brief to the Iowa court, ob-

---

[20] Humphrey, a 1979 Drake Law School graduate, had been editor-in-chief of the law review and had clerked for a federal magistrate during law school. Haas, also a 1979 Drake Law School graduate, was also on the law review and served as student bar president. As of the summer of 1983, the two lawyers (who had formed their firm in November 1980) had handled or were handling over 150 personal injury cases, in addition to their workers' compensation cases.

[21] Even if the First Amendment had permitted the Iowa court to conclude on this record that the ads were potentially misleading with respect to fees or quality, the proper remedy would have been to require appropriate disclaimers. As this Court has repeatedly stressed, "the preferred remedy is more disclosure, rather than less." *R.M.J., supra*, 455 U.S. at 201.

viously groping for some solid basis for the relief it had requested. Thus, this was not even a case in which "the charges are amended on the basis of . . . testimony" adduced during a trial (see *In re Ruffalo*, 390 U.S. 544, 551 (1968)); it is a case in which the charges are amended *after* the trial because the hearing produced no evidence to support the state's claims. But it has long been settled that "the right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18 (1938). This requirement is doubly important in this context, where there must be *record* support for a finding that an ad is misleading. *R.M.J.*, *supra*, 455 U.S. at 202, 205-07.[22] The Iowa court's judgment therefore violated due process.

C. The Ban on "Dramatic" Voices and "Self-Laudatory" Statements

The Iowa court sustained DR 2-101's ban on "dramatic" voices without analysis; to it, the meaning of the term is "commonly understood," and therefore DR 2-101's ban could not be condemned as vague. Humphrey and Haas submit that the court was wrong. A ban on the use of "dramatic" voices is inherently vague, for there is no voice that cannot be considered "dramatic," and no principled basis for distinguishing between the voice that is "dramatic" and a voice that is not. Indeed, by prohibiting a lawyer from speaking in his own television ads, the rule requires a lawyer to employ an actor if he desires to have his message heard; and it is hard to

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[22] See also *Thompson* v. *City of Louisville*, 362 U.S. 199, 204-06 (1960).

imagine how an actor's voice could be regarded as anything other than "dramatic."

No test of intonation or other criterion is provided by the rule for determining when a voice is "dramatic," and the rule's proscription is thus a recipe for arbitrary and discriminatory treatment of lawyers who advertise on television. This case is a perfect illustration. There was no shouting in the ads in question; there were no histrionics. The ads involved actors playing everyday people, speaking in everyday language about everyday needs, in perfectly measured tones. If there was anything "dramatic" about their voices, neither the Committee nor the Iowa Supreme Court explained what it was.[23]

Nor could Humphrey and Haas ever have suspected that the ads would be deemed "self-laudatory." Their ads made no claim as to the quality of their services, did not recite their credentials (although the rules permit credentials to be listed), and did not claim or suggest that the firm would render better service than other firms. If these ads were "self-laudatory," then all ads are "self-laudatory," and the ban on "self-laudatory" statements amounts to a ban on all ads. Applied to enjoin these ads on the ground that they contain "self-laudatory" statements in violation of DR 2-101(A), the rule is impermissibly vague—equivalent to the blanket advertising prohibitions held impermissible by *Bates* and its progeny.

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[23] Humphrey and Haas maintain that a ban on "dramatic" voices would be constitutionally infirm even if it were possible to define the term clearly, for the state has shown no substantial interest in suppressing voices merely because they are "dramatic." (See p. 13, above.)

CONCLUSION

Probable jurisdiction should be noted and either the judgment should be summarily reversed or the appeal should be set for briefing and argument on the merits.

Respectfully submitted,

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APPENDIX

84-1150

JAN 17 1985
ALEXANDER L. STEVAS
CLERK

No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARK A. HUMPHREY AND FREDD P. HAAS
d/b/a HUMPHREY & HAAS,
Appellants,

v.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT
OF THE IOWA STATE BAR ASSOCIATION,
Appellee.

On Appeal from a Judgment of the Iowa Supreme Court

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

IN THE SUPREME COURT OF IOWA

167
69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS, and JAMES E. GRITZNER, d/b/a HUMPHREY, HAAS AND GRITZNER,
Defendants.

Filed September 19, 1984

Original action.

Proceeding to enjoin lawyers from airing certain television advertisements. A counterclaim asks that our advertising rule be declared unconstitutional. INJUNCTION ISSUED.

Nick Critelli of Critelli and Sherburne, Des Moines, and Frank A. Comito of Comito and Capps, Des Moines, for plaintiff.

Mark W. Bennett of Babich, Bennett & Nickerson, Des Moines, and Wilcox & Ogden, Golden, Colorado, for defendants.

Erwin G. Krasnow and Barry D. Umansky, Washington, D.C., for amici curiae, Iowa Broadcasters Association and National Association of Broadcasters.

John W. Carley, general counsel, and William W. Jacobs, and Brenda W. Doubrava, Cleveland, Ohio, for amicus curiae, Federal Trade Commission.

Considered en banc.

HARRIS, J.

Our rule on lawyer advertising expressly prohibits television advertisements which contain background sound, visual displays, more than a single, nondramatic voice or self-laudatory statements. Believing the rule exceeded the standards outlined by the United States Supreme Court, defendant lawyers bought and aired television advertisements in clear violation of it. Plaintiff committee then brought this original action before us to enjoin the advertisements. Defendants answered and counterclaimed, asking that the rule, to the extent of the violation, be set aside as unconstitutional. We think the rule passes constitutional muster and order issuance of a permanent injunction.

The factual background can be briefly stated. In September of 1982, Des Moines attorneys Mark A. Humphrey, Fredd J. Haas, and James E. Gritzner, without seeking prior permission, aired the advertisements over a Des Moines television station for a three-day period. They had purchased the ads from a Denver corporation.

The ads were of three types. The first featured an actor and actress portraying a physician and nurse in an examination room. While the "nurse" looks at an X-ray, the "physician" says:

> We see first-hand injuries caused by the neglect of others. If you're seriously injured through the negligence of others, you should be talking to a lawyer. The choice of lawyer could be important. That's something to think about.

The second ad featured an actor portraying a printer standing in front of a press. The "printer" says:

> I suffered loss of wages, incurred staggering medical bills, and endured pain and suffering all through the negligence of others. I wasn't aware of my legal rights. I should have been talking to a lawyer.

The third featured actors portraying bowlers. The following conversation takes place at the lanes:

> Bowler 1: I've got to throw like that today; we're one man short.
>
> Bowler 2: He was injured through the negligence of others.
>
> Bowler 1: He should be talking to a lawyer.
>
> Bowler 2: The choice of that lawyer will be important.
>
> Bowler 1: That's something to think about.

In each of the advertisements, after the brief dramatization, the picture switches to a person portraying a receptionist in a law office. The name, address, phone number, and areas of practice of defendants' law firm are superimposed over the picture, and a voice says:

> If you're injured through the negligence of others, call the law firm of Humphrey, Haas & Gritzner. Cases involving auto accidents, work comp, serious personal injury and wrongful death handled on a percentage basis. No charge for initial consultation. Call now at 288-0102.

The voice repeats the phone number twice.

The television station discontinued the advertisements following a request from the ethics committee. The committee then commenced this action, requesting us to enjoin defendants from using the ads because they violate our professional canons DR 2-101 and DR 2-105. We granted a temporary injunction.

By answer and counterclaim, based on 42 U.S.C. § 1983, defendants Humphrey and Haas,[1] asserted that DR 2-101 and DR 2-105 violate the first and fourteenth amendments of the United States constitution. They also asserted the phrase "nondramatic voice" in DR 2-101(B) and the phrase "self-laudatory" in DR 2-101(A) are void for vagueness under the first and fourteenth amendments.

In July 1983, an evidentiary hearing was held before the Honorable C. Edwin Moore. We appointed senior judge Moore as commissioner of this court to conduct the hearing and summarize the evidence. The matter is before us on the record made before him.

Prior to 1977 Iowa's canons of ethics, in common with most such canons, strictly forbade lawyer advertising. The prohibition for the most part was never questioned. Indeed, prior to relatively recent times, the United States Supreme Court viewed regulation of commercial speech as tantamount to the regulation of a business activity: wholly permissible and without the protection of the first amendment. *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed.2d 1262 (1942).

Commercial free speech, however, was recognized by the court in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The right was first applied for lawyers in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), which held that no longer could a state absolutely prohibit lawyer advertising. It could only regulate it. The *Bates* opinion was later explained by the court in the case of *In re R.M.J.*, 455 U.S. 191, 199-202, 102 S.Ct. 929, 935-37, 71 L.Ed.2d 64, 71-74 (1982):

---

[1] Gritzner had withdrawn from the firm by this time and, in October 1982, we dismissed the action as to him.

The *Bates* Court held that . . . lawyer advertising was a form of commercial speech, protected by the First Amendment and that 'advertising' by attorneys may not be subject to blanket suppression. [Citing *Bates*]

More specifically, the *Bates* Court held that lawyers must be permitted to advertise the fees they charge for certain 'routine' legal services. The court concluded that this sort of press advertising was not 'inherently' misleading, and therefore could not be prohibited on that basis. The court also rejected a number of other justifications for broad restrictions on advertising including the potential adverse effect of advertising on professionalism, on the administration of justice, and on the cost and quality of the legal services, as well as the difficulties of enforcing standards short of an outright prohibition. None of these interests was found to be sufficiently strong or sufficiently affected by lawyer advertising to justify a prohibition.

But the decision in *Bates* nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated. False, deceptive, or misleading advertising remains subject to restraint, and the court recognized that advertising by the professions poses special risks of deception—'[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant and other advertising may be found quite inappropriate in legal advertising.' [Citing *Bates*] The Court suggested that claims as to quality or in-person solicitation might be so likely to mislead as to warrant restriction. And the Court noted that a warning or disclaimer might be appropriately required, even in the context of advertising as to price, in order to dissipate the possibility of consumer confusion or deception. '[T]he bar retains

> the power to correct omissions that have the effect of presenting an inaccurate picture, [although] the preferred remedy is more disclosure, rather than less. [Citing *Bates*]
>
> In short, although the Court in *Bates* was not persuaded that price advertising for 'routine' services was necessarily or inherently misleading, and although the Court was not receptive to other justifications for restricting such advertising, it did not by any means foreclose restrictions on potentially or demonstrably misleading advertising. Indeed, the Court recognized the special possibilities for deception presented by advertising for professional services. The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have legitimate interest in controlling.
>
> Thus, the Court has made clear in *Bates* and subsequent cases that regulation—and imposition of discipline—are permisssible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive. *Id.*

Other cases, in which the court considered restrictions on lawyer advertising, were *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) (political expression or association by lawyer working for American Civil Liberties Union called for "exacting scrutiny applicable to limitations on core first amendment rights" in reviewing lawyer solicitation rule) and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) (lower level of judicial scrutiny required for rule prohibiting in-person solicitation by lawyer).

To summarize the foregoing cases, the court set aside, as a special category, advertising which is misleading or which experience has proved to be inherently misleading. Commercial speech in this category can be appropriately restricted. Misleading advertising can be prohibited. Other lawyer advertising can be regulated if the state first demonstrates a compelling interest. But any restrictions must be narrowly drawn, and the state may regulate only to the extent regulation furthers substantial state interest.

Commercial free speech challenges to advertising rules are to be reviewed under the four-part analysis specified in *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341, 351 (1980). As we shall point out, a special problem is recognized in advertising by way of the electronic media.

We took some care in responding to the *Bates* opinion. We asked the ethics committee [2] to conduct public hearings, to investigate the matter of lawyer advertising, and to file with us a report with recommended advertising rules for the profession. After hearings and considerable study, the committee filed its report with us on January 18, 1980. Following our own extended study and consideration, we entered an order on May 6, 1980, which in effect adopted the committee's report and recommendations.

Despite objection voiced before the committee and later carefully considered by us, the rules contain the provision challenged here. DR 2-101 specifies in considerable detail what advertising is and is not prohibited. DR 2-101(A) generally prohibits:

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[2] The committee on professional ethics and conduct of the Iowa state bar association. Seven lawyer members of the committee are appointed, subject to our confirmation, by the Iowa state bar association. We appoint two lay members of the committee. See Iowa Court Rule 118.2.

> [A]ny form of public communication which contains a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement, which contains any statement or claim relating to the quality of . . . legal services, which appeals to the emotions, prejudices, or likes and dislikes of a person, or which contains any claim that is not verifiable . . . .

DR 2-101(B) separately deals with newspapers or periodicals, telephone directories, radio, and television. The rule lists 19 items thought to be useful to the public (names, fields of practice, office and telephone answering service hours, hourly fee rate, fixed fees, range of fees for specific legal services, date and place of bar admissions, various licenses and memberships, etc.). Only the listed items may be communicated to the public. As to television advertising the rule provides:

> The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated on television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only in the geographical area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. Any such information shall be presented in a dignified manner . . . .

I. Our advertising rule encompasses the "safe harbor" concept. The listed items may be communicated by the manner specified. A lawyer who feels constrained by the rules may petition to have them changed. The committee, as our commissioner acting on its own motion or upon the request of any Iowa lawyer, is to consider proposed amendments to the advertisement rules. *See* DR 2-101(D). Any recommended changes are to be consid-

ered by us and a prompt appeal to us is provided from the committee's rejection of requested changes. *Id.*

This proceeding, of course, is no such appeal. Rather than proposing rule changes which would authorize their television advertisements, defendants chose to violate the rule and defend their violation by challenging its constitutionality. Accordingly, we are dealing only with the rule's constitutionality, not with its wisdom. It should be scarcely necessary to point out that any lawyer asserting the wisdom of a rule change, should present the proposal to the committee under the procedure we have provided. The professional disciplinary system would be in utter chaos if violations could be defended on the ground the lawyer involved could think of a better rule.

Because the challenge is limited to its constitutional basis, we have set aside a number of criticisms that go only to the wisdom of the rule.

II. The United States Supreme Court seems not to have specifically addressed the use of sound, visual displays, and dramatization, but seems to clearly have recognized the electronic use of those devices as potentially misleading. It has referred to the "special problems" of television advertising:

> [T]he special problems of advertising on the electronic broadcast media will warrant special consideration. *Cf. Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.C. 1971), aff'd sub nom. *Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000, 31 L.2d 472, 92 S.Ct. 1289 (1972).[3]

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[3] The case cited by the Court contains the following statement:

> The fact is that there are significant differences between the electronic media and print. As the court noted in *Banzhaf* [*v. F.C.C.*, 132 U.S. App. D.C. 14, 405 F.2d 1082, 1100-01 (1968), cert. den., 396 U.S. 842], written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air'. In an age of omnipresent radio, there scarcely breathes

Bates, 433 U.S. at 384, 97 S.Ct. at 2709, 53 L.Ed.2d at 836.

In several cases, the court has described the broadcast media as uniquely pervasive or intrusive. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 748, 98 S.Ct. 3026, 3039, 57 L.Ed.2d 1073, 1093 (1978) ("the broadcast media has established a uniquely pervasive presence in the lives of all Americans."); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 127, 93 S.Ct. 2080, 2098, 36 L.Ed.2d 772, 798 (1973) ("viewers constitute a 'captive audience.'"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501, 101 S.Ct. 2882, 2889, 69 L.Ed.2d 800, 811 (1981) ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method.")

It is in view of these "special problems" that the committee argues two ways in which it feels the public might be misled[4] by defendant's television ads. First,

---

a citizen who does not know some part of a leading cigarette jingle by heart. . . . It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.

Capital Broadcasting Co., 333 F. Supp. at 586.

[4] The proposed model rule of professional conduct 7.1 defines a "false or misleading" communication as follows:

A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

the ad states that certain cases are handled on a percentage basis and there is no other charge for initial consultation. The committee thinks these statements mislead people into believing that pursuing the listed cases is a cost-free venture. It points out that the ads are "conspicuously" silent with regard to payment of expert witness fees and of other costs of litigation. The committee asserts defendants, like the defendant in *Ohralik v. Ohio State Bar Association*, 436 U.S. at 467, 98 S.Ct. at 1924, 56 L.Ed.2d at 461, used the contingency fee as a lure:

> He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer.

The second way the committee thinks defendant's ads are misleading stems from the statements which are thought to be self-laudatory comment on the advertisers' expertise. The committee argued that the firm's experience did not match their representation:

> Defendants had little in the way of experience when the commercials were broadcast. After graduation from law school, Mr. Humphrey had tried six cases, the nature of which are unknown, all while under the supervision of another Des Moines law firm. Mr. Haas had virtually no trial experience. Together, defendants Humphrey and Haas had only tried one case.

Without suggesting that the advertisements here were deceitful, we do agree with the committee that, in the medium defendants chose, the public could well be misled by them. We think the situation is exactly what the United States supreme court had in mind when it referred to the "special problems" in electronic media advertising. We think the challenged rule falls clearly within the area left to us by the *Bates* opinion.

The court has said that the state can regulate those types of advertising which result in instrusion, intimidation, overreaching, or undue influence. *See Ohralik*, 436 U.S. at 462, 98 S.Ct. at 1921, 56 L.Ed.2d at 457. A state can regulate advertisements which are inherently likely to deceive, or which the experience has proven to be subject to abuse. *See R.M.J.*, 455 U.S. at 202-03, 102 S.Ct. at 937, 71 L.Ed.2d at 73-74.

The court in *Bates* condemned those advertising rules which amounted to restrictions on the flow of "relevant information needed to reach an informed decision." *Bates*, 433 U.S. at 374, 97 S.Ct. at 2704, 53 L.Ed.2d at 829-30. The committee's position is that the *Bates* rationale does not apply to irrelevant information. Information is not relevant if it makes no contribution to informed decision making. In other words, prohibition of such information does not impede, and in fact advances, the fostering of rational decision making and maintaining of the bar's professionalism.

We think the ads here would not aid the public in making the informed decision which is subject to the protection recognized in *Bates*. This was the holding in *Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219, 1229 (S.D. Iowa 1981), which rejected a similar challenge to our rule, as it relates to television advertising.

The gist of the *Bishop* holding, as we understand, is that electronic promotional advertising can be prohibited. This was our understanding when we considered and adopted our advertising rule. It is no insult to the advertising industry, or to the electronic media, to believe that, when their efforts are combined on behalf of a lawyer, a line can and should be drawn between what informs the public and what promotes the lawyer. We thought the cases we have discussed allowed, even encouraged, us to draw such a line and we carefully

tried to draw it in such a way that the public would be informed and not misled. We think the rule is constitutional.

III. It is perhaps unnecessary, under our analysis, to explore the state interests involved. We do think the state interests in the challenged provisions of the rule are substantial. One such interest was recognized in *Bates*: fostering rational, intelligent, and voluntary decision making in determining the need for legal services and selecting a lawyer. *Bates*, 433 U.S. at 377, 97 S.Ct. at 2705, 53 L.Ed.2d at 831. *See also R.M.J.*, 55 U.S. at 200-01, 101 S.Ct. at 936, 71 L.Ed.2d at 72-73. We think the rule directly advances the state interest by aiding the citizen in making an intelligent selection of counsel.

IV. We reject defendants' contention that the prohibition against background sound, visual displays, multiple dramatic statements, and self-laudatory statements is more extensive than necessary to serve the state interests. All that is prohibited are the tools which would manipulate the viewer's mind and will.

Neither do we agree with defendants' criticism of what they call our "laundry list" approach. We specifically allowed dissemination of all information necessary to assist the public in seeking and selecting counsel. As previously mentioned, a procedure is in place for considering any suggested additions of useful information.

Neither do we find merit in defendants' vagueness defense. In their brief, defendants fail to mention why they believe "nondramatic voice" and "self-laudatory" are vague phrases. In its amicus brief, however, *F.T.C.* asserts that all advertisements are, to some degree, self-laudatory, and that all defendants' ads are no more self-laudatory than the information allowed under the rule. The commissioner also fears the prohibition against "self-laudatory" statements sets up an inherently subjec-

tive standard that can result in inconsistent treatment of identical conduct.

We explained the vagueness standard in *Incorporated City of Denison v. Clabaugh*, 306 N.W.2d 748, 751-52 (1981):

> A civil statute is unconstitutionally vague under the due process clause of the fourteenth amendment of the United States constitution when its language does not convey a sufficiently definite warning of proscribed conduct, when measured by common understanding or practice. [Authority.] Thus, when persons must necessarily guess at the meaning of the statute and its applicability, the statute is unconstitutionally vague. [Authority.] However, '[a] statute is not vague when the meaning of the words used can be fairly ascertained by reference to similar statutes, other judicial determinations, referenced common law, or to the dictionary, or if the words themselves have a common and generally accepted meaning.' *State v. Donner*, 243 N.W.2d 850, 853 (Iowa 1976).

"Nondramatic voice" is a simple phrase which we think is commonly understood. The dictionary meaning of "laudatory" is "expressing praise." Websters New International Dictionary, third ed. (1964). The terms are not vague.

It is unnecessary to discuss defendants' counterclaim which asks that we declare our rule to be unconstitutional. Because we find that the rule withstands defendants' constitutional challenge, we order that a writ issue, restraining defendants from continuing to place the advertisements.

WRIT ISSUED.

All justices concur except Larson and McCormick, JJ., who dissent.

LARSON, J. (dissenting).

I believe the laundry list of allowable advertising *content* is unnecessarily restrictive because it prohibits dissemination of basic information necessary for an informed judgment about the selection of an attorney and the protection of basic legal rights. As to the restrictions on *technique*, these are in fact a prescription for dullness, prohibiting all background music, dramatization, and other methods of stimulating viewer interest. It is undisputed that the effect of these limitations on technique is to substantially diminish the effectiveness of any television advertising. The combined effect of the rules is to inhibit dissemination of relevant information without a showing of a substantial state interest. This violates the free speech clause of the first amendment.

As the outset, we as lawyers must accept the reality that despite this perceived assault on the "professionalism" of the bar, and despite the exemption of commercial speech previously existing, lawyer advertising is here, and it is here in constitutional dimensions. It is here because of the Supreme Court interpretation of the free speech clause of the first amendment of the United States Constitution in both *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982).

First amendment protection of commercial speech, while not as extensive as that accorded other forms of speech, is nevertheless broad in its reach, and the principles to be applied are quite straightforward. *Central Hudson* sets forth the four-part test we must apply:

> (1) Do the ads concern an unlawful activity, or are they misleading? If the answer to either question is in the affirmative, first amendment protection is not allowed. If the answers to both questions are in the negative, the following tests apply:

(2) Is the governmental interest, asserted through these disciplinary rules, substantial?

(3) Does this regulation directly advance that governmental interest?

(4) Is the regulation more extensive than necessary to serve that interest?

See Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341, 351 (1980).

Although the majority recognizes the *Central Hudson* test, the opinion does not make it clear whether first amendment protection is unavailable for the defendant's advertisements because they are "misleading" under the first segment of the test or whether there is a substantial state interest which is directly advanced by those regulations under steps two and three of the *Central Hudson* test. I believe the majority is on shaky ground under either approach.

I. *Are the Advertisements "Misleading."*

It is interesting to note that the Committee's own expert, Dr. Haynes, testified the ads were not in fact misleading, and that his survey group, which had actually viewed the ads, agreed. The Committe's argument that they are deceitful is, in fact, an argument that they *might* mislead the viewer with respect to possible responsibility for court costs and with respect to the extent of the experience of Humphrey and Haas, which the Committee argues is minimal.

The majority specifically concludes that the *chance* of deceit is sufficient to deny first amendment protection "[w]ithout suggesting that the advertisements here were deceitful" because "in the medium defendants chose [television] the public could well be misled by them." It improvises on the four-prong test of *Central Hudson* by

saying that because television is the medium, a mere *chance* of deceit is sufficient. That theory, however, is not suggested in *Central Hudson* nor in any other case.

The majority draws support for this theory solely from language taken from *Bates* which, the majority says "seems to clearly have recognized the electronic use of [sound, visual displays, and dramatization] as potentially misleading." *Bates*, however, did not say there was more potential for abuse in electronic advertising, only that "the special problems of advertising on the electronic media will warrant special consideration." *Bates*, 433 U.S. at 384, 97 S.Ct. at 2709, 54 L.Ed.2d at 836. Neither *Bates* nor the case it cited on this issue even mentioned any increased potential of the electronic media for misleading the public. *See Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.C. 1971), *aff'd sub nom, Capital Broadcasting Co. v. Kleindiest*, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972). *Capital Broadcasting* illustrates the sort of "special problems" referred to in *Bates* in connection with television advertising. *Capital Broadcasting* justified a different rule for television advertising, not because it was likely to be misleading, but because it was nonselective. In effect, television was thought to be reaching too *large* an audience; children, who were being exposed to intensive cigarette advertising, were considered likely to be adversely affected by it.

Television advertising by lawyers, on the other hand, cannot be considered objectionable merely because television is nonselective, and the rationale of *Capital Broadcasting* is inapposite. Yet, the majority seizes on *Bates'* "special problems" language used in connection with the Court's reference to *Capital Broadcasting* as authority for its broad assertion of power in restricting television advertising. I do not think this language of *Bates* was intended to grant such a broad exercise of state power.

I believe the Supreme Court has actually made it clear that regardless of the medium used, advertising must be

more than "possibly" misleading in order to be denied first amendment protection. In *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982), the Court addressed the matter of untruthful advertising:

> [T]he Court has made clear in Bates and subsequent cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently *likely* to deceive or where the record indicates that a particular form or method of advertising *has in fact* been deceptive.

Id. at 202, 102 S.Ct. at 937, 71 L.Ed.2d at 73-74. (Emphasis added.)

A further indication that more than a possibility of deceit would be required is found in *R.M.J.*'s discussion of two prior cases in which first amendment protection was denied for professional advertising or solicitation. In discussing *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), the *R.M.J.* Court said "the possibility of 'fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct' was *so likely* in the context of in-person solicitation" that such solicitation could be prohibited. *R.M.J.*, 455 U.S. at 202, 102 S.Ct. at 937 L.Ed. 2d at 74. (Emphasis added.) Similarly, in discussing *Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed. 2d 100 (1979), the Court noted that first amendment protection on the use of trade names by Texas optometrists could be prohibited "in view of the *considerable history* in Texas of deception and abuse worked upon the consuming public through the use of trade names." *R.M.J.*, 455 U..S at 202, 102 S.Ct. at 937, 71 L.Ed.2d at 74. (Emphasis added.)

The Court in *R.M.J.*, after discussing *Ohralik* and *Friedman*, summarized the rule: "[W]hen the particular content or method of the advertising suggests that it is

inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions." *R.M.J.*, 455 U.S. at 203, 102 S.Ct. at 937, 71 L.Ed.2d at 74. *R.M.J.* involved printed advertising. There is no indication that a different rule would apply to television advertising, yet the Committee does not even attempt to meet the test.

Even if I were to accept the plaintiff's possibility-of-deceit argument, which I do not, I believe the record here still falls short of establishing any reasonable likelihood that this would happen.

The majority points to two aspects of the advertisements which it claims "might well be" misleading: (1) the statement that certain cases will be handled "on a percentage" basis without mention of court costs might be construed as an offer of "cost-free" services according to the majority; and (2) the advertisements could be construed as a claim of expertise by Humphrey and Haas which in fact is belied by their lack of actual experience.

As to the cost issue, it is true the advertisements state that fees will be assessed on "a percentage basis" (without stating a percentage rate) but do not mention court costs. To require a statement concerning costs, however, would go beyond our own advertising rules, which merely require it in the event the ad specifies a contingent fee rate. Even then the advertisement is merely required to disclose "whether percentages are computed before or after deduction of costs." *See* DR 2-101(C). Here, the defendants represent no contingency rate at all, only that the fee would be "a percentage." Significantly, also, DR 2-101(C) allows a lawyer to advertise "[f]ixed fees or range of fees for specific legal services" without a caveat about costs, despite the fact that many of the "specific legal services" listed, such as dissolutions, bankruptcies, and several real estate services, would necessarily involve either court costs or recording fees.

The Supreme Court, moreover, has apparently not considered a cost caveat to be necessary for a full disclosure on fees. *See, e.g., In re R. M. J.*, 455 U.S. at 194, n.3, 102 S. Ct. at 933, n.3, 71 L. Ed. 2d at 68, n.3 (fees for "routine" legal services may be advertised; no mention of court costs).

As a practical matter, the subject of court costs, affected by the extent of discovery and a myriad of other factors, is so complex as to make it impractical to explain in a thirty-second advertisement. (Testimony showed a thirty-second ad to consist of only about sixty words). Furthermore, any lack of understanding about this matter, or any other matter relevant to the terms of a lawyer's employment, would logically be resolved at the initial conference, which, in this case, was advertised as being free of cost. *See Bates*, 433 U.S. at 373, n.28, 97 S. Ct. at 2704, n.28, 53 L. Ed.2d at 829, n.28 (1977).

I believe the majority's conclusion that the advertisements overstated the lawyers' qualifications is also without support in the evidence. While the record revealed that these were young lawyers just developing a law practice, there is no evidence, nor even a claim, that they were in fact not qualified. While they lacked the experience of many older lawyers, they did have some experience in each of the areas listed, and the evidence showed they possessed above average academic qualifications. The Committee and the majority seem to equate qualification with experience, and there is simply no direct correlation. I believe the claim that this could "well be" false and misleading is plainly without support.

II. *The Public Interest Argument.*

If advertising concerns a lawful activity and is not misleading under the *Central Hudson* test, a state may restrict only if (1) the governmental interest is substantial; (2) the regulation directly advances that governmental interest; and (3) the restriction is no more ex-

tensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2350, 65 L. Ed. 2d at 351. I believe the restrictions imposed in this case fail that test because the Committee has not made the necessary showing of a substantial state interest.

The majority concludes that the state-interest issue is only secondary, stating "[i]t is perhaps unnecessary, under our analysis, to explore the state interests involved." The "analysis" which the majority says makes it unnecessary to address the issue is apparently that the advertisements are actually misleading under the first prong of the *Central Hudson* test, therefore not subject to any first amendment protection regardless of a supporting state interest. *See Central Hudson*, 447 U.S. at 563, 100 S. Ct. at 2350, 65 L. Ed. 2d at 349.

As I have already noted, however, the ads are not even claimed to be actually misleading, and any risk of possible misleading is minimal—certainly not sufficient to justify denial of first amendment protection without even considering the state interest. I believe, in fact, analysis of the state interest is the pivotal issue in this case.

What is that interest? The majority identifies only one in support of the restrictive rules: "fostering rational, intelligent, and voluntary decision making in determining the need for legal services and selecting a lawyer," citing *Bates* and *R. M. J.*

It is interesting, however, that both *Bates* and *R. M. J.* used this language to expand the scope of lawyer advertising, not to throttle it.

Moreover, there is a strong state interest in what is essentially a by-product of attorney advertising. This is the need for members of the public to be informed about the nature of their legal rights and the means of pursuing them. As the Supreme Court has said, it would be unusual to meet the need for more informed judgments by reducing the scope of available information:

> Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. . . . Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on for benefits of public ignorance.

Bates, 433 U.S. at 374-75, 97 S. Ct. at 2704, 53 L. Ed. 2d at 829-30. In providing information for the formation of an informed judgment, it seems to me that it is preferable to provide an excess of information, rather than too little. Viewers are sophisticated enough to accept or reject it as they see fit.

Broad areas of information necessary to an informed judgment are prohibited by our rules. In the present case, the advertisements inform the viewer that, if one is hurt through the negligence of others, he should see a lawyer and imply that recovery for losses might be obtained. One advertisement points out that legal rights may be lost by failure to talk to a lawyer. These and many other types of information including, most obviously, such matters as statutes of limitation, the early filing requirements of our tort claims act, and the problems of uninformed releases of claims are all of great importance to an informed decision of the viewer. Yet these, and all other items of general information on the rights of litigants are prohibited by the rules, because they are not included in the "laundry list" of contents.

I believe the state interest served by this type of information far outweighs any interest in denying it. *Bates* and *R. M. J.* make it clear that present methods of de-

livering legal services are ineffective. In *Bates*, the court said:

> The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney. Indeed, cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.

Id. at 370-71, 97 S. Ct. at 2702, 53 L. Ed. 2d at 827-28.

American Bar Association statistics cited in *Bates* show that the "middle 70% of our population is not being reached or served adequately by the [legal] profession." *Id.* at 376, 97 S. Ct. at 2705, 53 L. Ed. 2d at 831.

In Iowa, a recent study shows that there is only one Legal Services Corporation lawyer for each 8700 eligible recipients. Equal Access to Services Study, Legal Services Corporation of Iowa (1984). Moreover, many of the traditional points of contact between lawyers and potential clients, such as the country club or Rotary Club are simply not viable sources of preliminary legal information for a great segment of our population.

I believe the thrust of the Rule 2-101 laundry list largely misses the point of public information. What difference does it make to potential litigants when the lawyer was born, the legal fraternities, societies or bar association of which the lawyer is a member (especially since membership usually is not based on any required level of professional competency) or whether the lawyer has had military service? This is relatively unimportant information, in view of the possibility that litigants might lose their claims, through lack of information, to a statute

of limitation or other legal impediment as to which they remain ignorant.

I believe our rules, insofar as they ban advertising which is false or misleading, are valid. This is basically the model rule of the American Bar Association[1] and the rule of most states. Beyond that, I believe the additional restrictions of our rules fail the state interest test and are therefore invalid.

I believe, moreover, that the model rule illustrates the "less restrictive" means of control alluded to in *Central Hudson*, and that the Committee has failed to show that they would not be effective here. For that additional reason, I believe the restrictions imposed here fail the test of constitutionality.

I would dissolve the injunction and grant judgment for the defendants on their counterclaim.

McCormick, J., joins this dissent.

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[1] RULE 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK HUMPHREY, FREDD J. HAAS, and JAMES E. GRITZNER, d/b/a HUMPHREY, HAAS AND GRITZNER,
Defendants.

MARK A. HUMPHREY and FREDD J. HAAS, individually and doing business as HUMPHREY AND HAAS,
Counterclaimants,

vs.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Defendant to Counterclaim.

[Filed Nov. 19, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Defendants/Counterclaimants, Mark A. Humphrey and Fredd J. Haas, individually

and doing business as Humphrey and Haas, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Iowa entered in this action on September 19, 1984, upholding the constitutionality of DR 2-101 of the Iowa Code of Professional Responsibility for Lawyers, and permanently enjoining Defendants/Counterclaimants from using television advertisements that violate that rule.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Mark W. Bennett
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Counterclaimants, Mark
A. Humphrey and Fredd J.
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Defendant to Counterclaim

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-431

MARK A. HUMPHREY AND FREDD J. HAAS,
Appellants,

v.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION

ORDER

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including 17 January, 1985.

/s/ Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 6th
day of December 1984.

APPENDIX D

Iowa Code of Professional Responsibility for Lawyers

DR 2-101 Publicity.

(A) A lawyer shall not, on the lawyer's own behalf or that of a partner, associate or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory or unfair statements, which contains any statements or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, or likes or dislikes of a person, or which contains any claim that is not verifiable; nor shall the lawyer use or participate in the use of any form of public communication, calculated to attract clients for the lawyer's pecuniary gain, which contains any information not hereafter specifically permitted. In all communications under DR 2-101 and DR 2-102 the lawyer may use restrained subjective characterizations of rates or fees such as "reasonable," "moderate," and "very reasonable," but shall avoid all unrestrained subjective characterizations of rates or fees, such as, but not limited to, "cut-rate," "lowest," "give-away," "below-cost," and "special." The lawyer shall further avoid the use of all signs and symbols such as, but not limited to, logos, trademarks, graphics, design work, and pictures.

(B) The following information, in words and numbers only, may be communicated to the public in newspapers, periodicals, trade journals, "shoppers" and other similar advertising media, published and disseminated in the geographic area in which the lawyer maintains offices or in which a

significant part of the lawyer's clientele resides or in the classified advertising section of the telephone directory distributed in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides or in reputable legal directories generally available in such area. The same information may be communicated by direct mail. The same information, in words and numbers only, articulated only by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio. The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. Any such information shall be presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers and the designation "lawyer", "attorney", "law firm" or the like;

(2) Fields of practice, limitation of practice or specialization, but only to the extent permitted by DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching position;

(10) Memberships, offices and committee assignments in bar associations;

(11) Membership and offices in legal fraternities and legal societies;

(12) Technical and professional licenses;

(13) Memberships in scientific, technical and professional associations and societies;

(14) Foreign language ability;

(15) Names and addresses of bank references;

(16) With their written consent, names of clients regularly represented;

(17) Subject to DR 2-103, prepaid or group legal services programs in which the lawyer participates;

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours;

(20) Race, sex, religion, or ethnic background.

Nothing contained herein shall prohibit a lawyer from permitting the inclusion in reputable law lists and law directories intended primarily for the use of the legal profession of such information as traditionally has been included in these publications.

(C) The following fee information, in words and numbers only, may be communicated to the pub-

lic in the manner permitted by DR 2-101(B). Any such information shall be presented in a dignified manner:

(1) Fee for an initial consultation;

(2) Availability upon request of either a written schedule of fees or an estimate of the fee to be charged for specific services, or both;

(3) Contingent fee rates subject to DR 2-106 (C), provided that the statement discloses whether percentages are computed before or after deduction of costs;

(4) Fixed fees or range of fees for specific legal services or hourly fee rates provided that, in print size at least equivalent to the largest print used in setting forth the fee information, the statement disclosed:

(a) that the stated fixed fees or range of fees will be available only to clients whose matters are encompassed within the described services, and

(b) if the client's matters are not encompassed within the described services, or if an hourly fee rate is stated, the client is entitled, without obligation, to a specific written estimate of the fees likely to be charged.

(D) For purposes of this rule, the term "specific legal services" shall be limited to the following services:

(1) Abstract examinations and title opinions not including services in clearing title;

(2) Uncontested dissolutions of marriage involving no disagreement concerning custody of

children, alimony, child support or property settlement [see DR 5-105(A)];

(3) Wills leaving all property outright to one beneficiary and contingently to one beneficiary or one class of beneficiaries;

(4) Income tax returns for wage earners;

(5) Uncontested personal bankruptcies;

(6) Changes of name;

(7) Simple residential deeds;

(8) Residential purchase and sale agreements;

(9) Residential leases;

(10) Residential mortgages and notes;

(11) Powers of attorney;

(12) Bills of sale.

The committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to the Code, expanding or constricting the above list of "specific legal services". In considering such amendments the committee shall apply the following criteria which have guided the supreme court in determining which services should be included in the above list:

(1) The description of the service would not be misunderstood by the average layperson or be misleading or deceptive;

(2) Substantially all of the service normally can be performed in the lawyer's office with

the aid of standardized forms and office procedures;

(3) The service does not normally involve a substantial amount of legal research, drafting of unique documents, investigation, court appearances or negotiation with other parties or their attorneys; and

(4) Competent performance of the service normally does not depend upon ascertainment and consideration of more than a few varying factual circumstances.

The committee shall adopt regulations, subject to the approval of the supreme court, to provide a procedure to receive and consider such requests from lawyers, and for the prompt submission to this court of any appeal from a determination adverse to such request. Said committee may further issue, subject to the approval of the supreme court, regulations further defining or describing "specific legal services" within the meaning of this rule.

(E) Unless otherwise specified in the public communication concerning fees, the lawyer shall be bound, in the case of fee advertising in the classified section of the telephone directory, for a period of at least the time between printings of the directory in which the fee advertisement appears and in the case of all other fee advertising for a period of at least ninety days thereafter, to render the stated legal service for the fee stated in the communication unless the client's matters do not fall into the described services. In that event, or if a range of fees is stated, he shall render the service for the estimated fee given the client in advance of rendering the service.

(F) A lawyer shall not, on behalf of himself, his partners, associates or any other lawyer affiliated with him or his firm, use the public communication of fee information concerning specific legal services as an indirect means of attracting clients for whom he performs other legal services not related to the specific legal services publicized; nor may the term "clinic" or any similar term be used in any communication to the public unless the practice of the lawyer or his firm is limited to routine matters for which costs of rendering the service can be substantially reduced because of the repetitive nature of the services performed and the use of standardized forms and office procedures. Whether or not it contains fee information, a lawyer shall preserve in his office a copy of each advertisement placed in a newspaper, the classified section of the telephone directory, or periodical and a tape of the radio or television commercial or recording for at least three years and a record of the date or dates and name of the publication in which it appeared or the name of the station upon which it was aired.

(G) A lawyer recommended by, paid by or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits.

(H) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue;

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients;

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer;

(4) In and on legal documents prepared by him;

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof; and

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-101(B), directed to a member or beneficiary of such organization.

(I) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item nor voluntarily give any information to such representatives which, if published in a news item, would be in violation of DR 2-101(A).

[Court Order February 28, 1977; February 17, 1978; July 24, 1979; May 6, 1980; Oct. 10, 1984.]

* * * *

DR 2-105. Description and Limitation of Practice

(A) A lawyer may hold himself out publicly as practicing in or limiting his practice to certain fields of law as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents", "Patent Attorney", "Patent Lawyer", or "Registered Patent Attorney" or any combination of those terms, on his professional card, letterhead, office sign, professional notice or announcement, and telephone directory listings, all as otherwise allowed by DR 2-102 (A), and in newspapers, periodicals and legal directories, as otherwise allowed by DR 2-101(B). In addition to use of the designation "Patents", "Patent Attorney", "Patent Lawyer", and "Registered Patent Attorney", a lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Trademarks", "Trademarks and Copyright Matters", "Trademark Attorney", "Trademark Lawyer", or any combination of those terms on his professional card, letterhead, office sign, professional notice or announcement and telephone directory listing, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals and legal directories as otherwise allowed by DR 2-101(B), provided the lawyer satisfies the eligibility requirements of DR 2-105(A)(4) in any one of the fields of practice of "Patents, Trademarks or Copyright Matters" or combination thereof.

(2) An individual lawyer who, in fact, limits practice to certain fields of law or who is limiting this practice primarily to certain fields of law, and who satisfies the eligibility requirements of DR 2-105(A)(4), may indicate such limitation or de-

scription of practice by listing, in the manner provided by DR 2-105(A)(3), not more than three of the following fields of law practice in any communication otherwise allowed by DR 2-102(A) and DR 2-101(B):

Administrative Agency Matters
Admiralty
Antitrust and Trade Regulation
Appellate Practice
Banking and Creditor Law
Constitutional Law
Consumer Claims and Protection
Corporate Finance and Securities Law
Corporation and Business Law
Criminal Law
Debt and Bankruptcy Matters
Domestic Relations and Family Law
Environmental Law
Health Law
Immigration and Customs
Insurance
International and Foreign Law
Job Discrimination and Civil Rights
Labor Law
Legislative Matters
Military Law
Municipal and Local Government Law and Finance
Pension, Profit Sharing and Employee Benefit Plans
Personal Injury and Property Damage Claims
Public Utility Matters
Real Estate Law
Taxation Law
Trademarks and Copyright Matters
Transportation Law

Trial Practice
Wills, Estate Planning and Probate Matters
Workers Compensation

The committee on professional ethics and conduct of the Iowa State Bar Association, acting as Commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to the Code expanding or restricting the permitted list of fields of law practice.

(3) Description or indication of limitation of practices permitted by DR 2-105(A)(2) shall be only in the following manner:

(a) If the lawyer accepts only legal matters in his listed fields of law practice, such listing of fields of law practice shall be preceded by the words "Practice limited to . . ."; or

(b) If the lawyer is practicing primarily in his listed fields of law practice but he also accepts other types of legal matters, such listing of fields of law practice shall be preceded by the words "Practicing primarily in . . .";

and shall, in the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, or in newspapers, periodicals and legal directories, contain within such communication, or have prominently displayed on the same page of such communication, a "Notice to the Public" in the following form:

(c) "A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

In the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, a lawyer shall not permit his name to be listed under a heading or classification other than "Attorneys" or "Lawyers".

(4) Prior to communication of a description or indication of limitation of practice permitted by DR 2-105(A)(2), a lawyer shall report his compliance with the following eligibility requirements each year in the written report required to be submitted to the Commission on Continuing Legal Education:

(a) The lawyer must have devoted the greater of 200 hours or twenty percent of his time spent in actual law practice to each separate indicated field of practice for each of the last two calendar years; and

(b) The lawyer must have completed at least ten hours of accredited Continuing Legal Education courses of study

in each separate indicated field of practice during the preceding calendar year.

The first report of compliance may be made in 1979. In reporting compliance with subsection (a), a statement of compliance is sufficient. In reporting compliance with subsection (b), the lawyer shall identify the specific courses and hours which apply to each indicated field of practice. Contents of the portion of the report required by this rule shall be public information.

(B) A lawyer may communicate the name of state and federal courts in which he or she is currently permitted to practice on his professional card, letterhead, office sign, professional notice or announcement, and telephone directory listings, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals and legal directories, as otherwise allowed by DR 2-101(B).

If, due to hardship or extenuating circumstances, a lawyer is unable to complete the hours of accredited continuing legal education during the preceding calendar year as required by DR 2-105(A)(4)(b), the lawyer may apply to the Commission on Continuing Legal Education for an extension of time in which to complete the hours. No extension of time shall be granted unless written application therefor shall be made on forms prescribed by the Commission. Extensions of time within which to fulfill the minimum educational requirements may, in individual cases involving hardship or extenuating circumstances, be granted by the Commission for a period not to exceed six months immediately following expiration of the year in which the requirements were not met.

[Amended Feb. 17, 1978; Oct. 11, 1978; Mar. 5, 1979; May 29, 1979; Oct. 10, 1984.]

APPENDIX E

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff

vs.

MARK A. HUMPHREY, FREDD J. HAAS and JAMES E. GRITZNER, dba HUMPHREY, HAAS AND GRINTZNER,
Defendants

[Filed Sept. 14, 1982]

PETITION FOR INJUNCTION

Comes now the Plaintiff, the Committee on Professional Ethics and Conduct of The Iowa State Bar Association, and pursuant to Iowa Rules of Civil Procedure, and for its Petition for Injunction states:

1. That the Plaintiff, the Committee on Professional Ethics and Conduct of The Iowa State Bar Association, is a regularly appointed standing Committee of The Iowa State Bar Association the members of which are Commissioners of the Supreme Court, whose Chairman is James E. Cooney of Des Moines, Iowa.

2. That the Defendants, Mark A. Humphrey, Fredd J. Haas and James E. Gritzner, individuals who are licensed to practice law in various courts of the State of Iowa,

who practice under the firm name of Humphrey, Haas and Gritzner, and all times material hereto, reside and have offices for the practice of law in Des Moines, Polk County, Iowa.

3. That the Iowa Supreme Court has by Court Order promulgated certain rules governing the practice of law, said rules are known as The Iowa Code of Professional Responsibility for Lawyers.

4. That contained in the Iowa Code of Professional Responsibility for Lawyers are DR2-101 which governs Publicity and DR2-105 which governs Description and Limitation of Practice.

5. That pursuant to DR2-101(D) the Plaintiff did as part of their rules establish and obtain confirmation by Supreme Court Order of procedures for lawyers to obtain advance approval of publicity which is at variance with the provisions of DR2-101 and DR2-105 or to apply to have said rules changed. Said procedures are set out in Rules 5.1 through 5.6 of the Rules of Procedure Professional Ethics and Conduct Committee of The Iowa State Bar Association.

6. That the Defendants have contracted with Palmer Communications, Inc. (WHO-TV) to televise three different commercials advertising their services.

7. That the television commercials violate the provisions of DR2-101 in that said commercials contain more than a single non-dramatic voice, have background sound and visual displays of two or more people characterizing themselves as clients which make laudatory comment as to Defendants' services.

8. That the television commercials violate the provisions of DR-105 in that they list four areas of practice and contain no disclaimer.

9. That the said commercials have been shown on television station WHO-TV eleven (11) times in the past and

is [sic] scheduled to be shown for a total period of forty-seven (47) weeks.

10. That the Defendants at no time sought or received any advance approval for either a change in DR2-101 or DR2-105, nor did they seek or receive approval for the specific commercials shown by Palmer Communications, Inc. (WHO-TV).

11. That Chapter 610 of the Iowa Code and Supreme Court Rule 118 provides procedures for disciplining lawyers who violate the Iowa Code of Professional Responsibility for Lawyers, but these procedures by necessity take long periods of time, and do not provide for any procedures to stop the continued violation of said rules.

12. That the Plaintiff herein is charged with the duty and responsibility to investigate and bring appropriate action against lawyers who violate any provisions of the Iowa Code of Professional Responsibility for Lawyers.

13. That the Plaintiff has received, through communications to its staff, information that Defendants intend to continue to show the commercials either on WHO-TV or some other television station in the Des Moines viewing area.

14. That unless restrained the Defendants will continue in their violation of DR2-101 and DR2-105, said conduct causing irreparable damage and thereby causing any judgment ineffectual.

15. That there is no other adequate remedy at law in which to restrain said violation.

16. That this Petition has not been presented to or refused in whole or in part by any other Judge or Justice.

WHEREFORE, Plaintiff prays that the Court issue a temporary injunction without notice enjoining the Defendants from advertising by use of the television com-

mercial advertisements currently in the possession of Palmer Communiactions, Inc. or by any advertisement in conflict with the Iowa Code of Professional Responsibility for Lawyers and for an order commanding the Defendants to withdraw forthwith the television commercials heretofore shown by Palmer Communications, Inc. (WHO-TV).

Plaintiff further prays that the Court issue a permanent injunction and that the Court set the matter of permanent injunction for hearing and prescribe notice and that on hearing the Court permanently enjoin the Defendants from further violation of the Iowa Code of Professional Responsibility for Lawyers via television commercials.

Plaintiff further prays that the Court set bond as provided by the Iowa Rules of Civil Procedure.

Plaintiff further prays for such other and further relief as the Court may deem just and equitable in consideration of the premises.

/s/ Frank A. Comito, Jr.
FRANK A. COMITO, JR.
Comito and Capps
4701 University Avenue
Des Moines, Iowa 50311
(515) 274-4105

APPENDIX F

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS, and JAMES E. GRITZNER, d/b/a HUMPHREY, HAAS AND GRITZNER,
Defendants.

MARK A. HUMPHREY and FREDD J. HAAS, individually and doing business as HUMPHREY AND HAAS,
Counterclaimants,

vs.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Defendant to Counterclaim.

[Filed Sept. 30, 1982]

ANSWER AND COUNTERCLAIM

ANSWER

COME NOW Defendants, Mark A. Humphrey and Fredd J. Haas, individually and doing business as Humphrey and Haas (hereinafter referred to as the "Defendants"), and for their Answer to Plaintiff's Petition for Injunction, respectfully state to the Court as follows:

1. The Defendants admit the allegations contained in paragraphs 1, 3, 4, 5, 9, 10, 12, 13, 15 and 16 of Plaintiff's Petition for Injunction.

2. The Defendants admit the allegations contained in paragraph 2 of Plaintiff's Petition for Injunction, but affirmatively state that as of September 13, 1982, James E. Gritzner was no longer associated with their law firm, and the name of the firm is now "Humphrey and Haas".

3. The Defendants deny the allegations contained in paragraph 6 of Plaintiff's Petition for Injunction.

4. In response to paragraph 7 of Plaintiff's Petition for Injunction, the Defendants admit that the television commercials contain more than a single voice and have background sounds and visual displays, but deny that the advertisements depict two or more people characterizing themselves as clients of Defendants, and further deny that the advertisements make laudatory comments as to the Defendants' services.

5. The Defendants deny the allegations contained in paragraph 8 of Plaintiff's Petition for Injunction.

6. In response to paragraph 11 of Plaintiff's Petition for Injunction, the Defendants admit that Chapter 610, *Code of Iowa* (1981), and Supreme Court Rule 118, provide procedures for disciplining lawyers who violate the Iowa Code of Professional Responsibility, but deny that these procedures "by necessity take long periods of time", and "do not provide for any procedures to stop the continued violation of said rules".

7. In response to paragraph 14 of Plaintiff's Petition for Injunction, the Defendants state that they would have continued to run television advertisements "unless restrained", but specifically deny that the continuation of their television advertising has, would or could cause any irreparable damage.

First Affirmative Defense

DR 2-101 of the Iowa Code of Professional Responsibility for Lawyers, entitled "Publicity", is facially unconstitutional, and is unconstitutional as applied to Defendants' television advertising, in violation of Defendants' rights of freedom of speech under the First Amendment to the United States Constitution.

Second Affirmative Defense

The phrase "nondramatic voice" contained in DR 2-101(B) of the Iowa Code of Professional Responsibility for Lawyers, is void for vagueness, in violation of the First and Fourteenth Amendment to the United States Constitution.

Third Affirmative Defense

The phrase "self-laudatory" contained in DR 2-101(A) of the Iowa Code of Professional Responsibility for Lawyers, is void for vagueness, in violation of the First and Fourteenth Amendments of the United States Constitution.

Fourth Affirmative Defense

DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers, entitled "Description and Limitations of Practice", is facially unconstitutional, and is unconstitutional as applied to Defendants' television advertising, in violation of Defendants' rights of freedom of speech under the First Amendment to the United States Constitution.

WHEREFORE, Defendants pray that Plaintiff's Petition for Injunction be dismissed at Plaintiff's costs.

COUNTERCLAIM

COME NOW Mark A. Humphrey and Fredd J. Haas, individually and doing business as Humphrey and Haas, and for their Counterclaim herein, respectfully state to the Court as follows:

I. *INTRODUCTION.*

1. Counterclaimants seek declaratory and injunctive relief that the Iowa Code of Professional Responsibility for Lawyers, as it relates to television advertising, is unconstitutional and violates the First and Fourteenth Amendments to the United States Constitution.

II. *PARTIES.*

2. Counterclaimants are lawyers licensed to practice law in various courts in the State of Iowa, and practice under the firm name of "Humphrey and Haas". At all times material to this action, Counterclaimants have resided and have had offices for the practice of law in Des Moines, Iowa.

3. Defendant to Counterclaim is a regularly appointed standing committee of the Iowa State Bar Association, the members of which are commissioners of the Iowa Supreme Court, and as such, are charged with the duty and responsibility of initiating and investigating violations of the Iowa Code of Professional Responsibility for Lawyers.

III. *JURISDICTION.*

4. Jurisdiction of this counterclaim is predicated upon 42 U.S.C. § 1983, and Rules 29 and 30 of the Iowa Rules of Civil Procedure.

IV. *FACTUAL BACKGROUND.*

5. Commencing on September 6, 1982, Counterclaimants engaged in television advertisements on behalf of their law firm.

6. On September 14, 1982, Defendant to Counterclaim initiated a Petition for Injunction in this Court and obtained a temporary injunction against the Counterclaimants, enjoining them from using television commercials alleged to be in violation of the Iowa Code of Professional Responsibility for Lawyers.

7. Counterclaimants desire to continue to engage in television advertising on behalf of their law firm, which would be in violation of the Iowa Code of Professional Responsibility for Lawyers, specifically DR 2-101 and DR 2-105, as they relate to television advertising.

8. The actions of Defendant to Counterclaim in enforcing the Iowa Code of Professional Responsibility for Lawyers, as it relates to television advertising by lawyers, and in filing the Petition for Injunction in this matter, arise under color of state law.

9. Counterclaimants are suffering irreparable injury as a result of the denial of their right to run their television advertisements and the imposition of Disciplinary Rules which unconstitutionally restrict their rights to freedom of speech under the First Amendment to the United States Constitution.

10. The enforcement of the unconstitutional restrictions contained in the Iowa Code of Professional Responsibility for Lawyers, and the filing of the Petition for Injunction by Defendant to Counterclaim, are the proximate cause of the violations of Counterclaimants' First Amendment rights.

V. *ALLEGATIONS OF UNCONSTITUTIONALITY.*

11. DR 2-101 of the Iowa Code of Professional Responsibility for Lawyers entitled "Publicity", and DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers, entitled "Description and Limitation of Practice", are unconstitutional, in violation of the freedom of speech clause of the First Amendment to the United

States Constitution, and the due process clause of the Fourteenth Amendment to the United States Constitution.

VI. *RELIEF.*

12. Counterclaimants respectfully pray that this Court issue a declaratory judgment pursuant to Iowa Rule of Civil Procedure 261, declaring that DR 2-101 and DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers, as they relate to television advertising, unconstitutionally restrict Counterclaimants' First Amendment freedoms and violate the due process clause of the Fourteenth Amendment of the United States Constitution.

13. Counterclaimants respectfully pray for a permanent injunction, pursuant to Iowa Rule of Civil Procedure 320, enjoining the Defendant to Counterclaim from enforcing, either facially or as applied, those portions of DR 2-101 and DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers, as they relate to television advertising, which violate Counterclaimants' First and Fourteenth Amendment rights.

14. Counterclaimants respectfully pray for reasonable attorneys' fees pursuant to the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988.

WHEREFORE, Counterclaimants respectfully pray for the relief set forth above.

/s/ Mark W. Bennett
MARK W. BENNETT
Babich, Bennett & Nickerson
5835 Grand Avenue, Suite 202
Des Moines, Iowa 50312
515-274-3581
Attorney for Defendants
and Counterclaimants,
Mark A. Humphrey and
Fredd J. Haas, Individually
and Doing Business as
Humphrey and Haas

Original and two copies filed; copy mailed to:

Frank A. Comito, Jr.
Attorney at Law
4701 University Avenue
Des Moines, Iowa 50311
Attorney for Plaintiff

APPENDIX G

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS and JAMES E. GRITZNER, dba HUMPHREY, HAAS AND GRITZNER,
Defendants.

[Filed Sept. 14, 1982]

ORDER FOR TEMPORARY INJUNCTION AND NOTICE OF HEARING ON PERMANENT INJUNCTION

NOW on this 14th day of Sept., 1982, this matter comes to the attention of this Court upon the verified Petition of the Plaintiff seeking both a temporary and permanent injunction against the Defendants enjoining them from using television commercials alleged to be in violation of the Iowa Code of Professional Responsibility for Lawyers. That based upon the information contained in the verified Petition the Court finds that it has jurisdiction of the parties and the subject matter. Further that a temporary injunction should issue without notice and that the matter of the permanent injunction of the parties should be set down for hearing and notice be given to the Defendants.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendants are temporarily enjoined from using the television commercials currently in the possession of Palmer Communications, Inc. for the purpose of advertising their services, and shall forthwith withdraw the same from further use.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the matter of the permanent injunction prayed for by the Plaintiff in its Petition be set down for hearing on the 23 day of Sept., 1982, at 3:00 o'clock p.m. before the Iowa Supreme Court, State Capitol Building, Des Moines, Iowa, and that notice of said hearing shall be had by serving a copy of the Petition and the Order upon the Defendants by personal service at least 7 days prior to the time set for hearing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any Defendant may file an application to have the matter as to the sufficiency of evidence relative to the temporary injunction be set down for hearing prior to the time set for hearing on the permanent injunction.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said temporary injunction shall issue upon Plaintiff's filing bond with surety approved by the Clerk in the penal sum of $500.00.

/s/ Mark McCormick
Justice of the
Iowa Supreme Court

APPENDIX H

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS, and JAMES E. GRITZNER, d/b/a HUMPHREY, HAAS AND GRITZNER,
Defendants.

[Filed Sept. 28, 1982]

ORDER

On September 14, 1982 defendants were temporarily enjoined from using the television commercials in the possession of Palmer Communications, Inc. for the purpose of advertising their services, and ordered to withdraw the same from further use. The permanent injunction issue was scheduled for hearing September 22, 1982. Defendants Mark A. Humphrey and Fredd J. Haas have consented to continuance of the temporary injunction until an evidentiary hearing and final ruling by this court.

The court finds the hearing should be continued so that an evidentiary hearing may be held. The Honorable C. Edwin Moore is hereby appointed a Commissioner of this court to conduct a hearing in the above matter at a time and place to be selected by him.

The proceedings shall be reported and a transcript thereof filed with the clerk of this court by a certified shorthand reporter selected by the Commissioner and paid by the State of Iowa.

The Commissioner shall prepare a written summary of the evidence, but shall make no findings of fact or reach any conclusions of law. The summary shall be filed with the clerk of this court. Both parties may obtain discovery, if necessary, by those methods and under such conditions as shall be determined by the Commissioner upon motion.

Done this 28th day of September, 1982.

THE SUPREME COURT OF IOWA

By /s/ W. W. Reynoldson
W. W. REYNOLDSON
Chief Justice

Copies to:

Frank A. Comito, Jr.
Comito and Capps
4701 University Avenue
Des Moines, Iowa 50311

Humphrey & Haas
808 5th Avenue
Des Moines, Iowa 50309

Mark W. Bennett
Babich, Bennett & Nickerson
5835 Grand Avenue, Suite 202
Des Moines, Iowa 50312

James E. Gritzner
1549 N.W. 91st Street
Des Moines, Iowa 50322

Members of the Supreme Court

Honorable C. Edwin Moore
Polk County Courthouse
Des Moines, Iowa 50309

APPENDIX I

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS, and JAMES E. GRITZNER, d/b/a HUMPHREY, HAAS AND GRITZNER,
Defendants.

MARK A. HUMPHREY and FREDD J. HAAS, individually and doing business as HUMPHREY AND HAAS,
Counterclaimants,

vs.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Defendant to Counterclaim.

[Filed Nov. 16, 1983]

REPORT OF HEARING COMMISSIONER

Mr. Chief Justice and Members of the Iowa Supreme Court:

The undersigned appointed Hearing Commissioner submits the attached summary of the evidence taken in the above entitled cause.

It has been prepared with the assistance of the research department of the court, within the restrictions set out in the order of my appointment.

The 840 page transcript, the many exhibits listed therein and the summary have this day been filed with the clerk.

The clerk of this court shall promptly transmit copies of this order to the parties, or their attorneys of record, and all members of the court.

Respectfully submitted this 16th day of November, 1983.

/s/ C. Edwin Moore
C. EDWIN MOORE
Hearing Commissioner

SUMMARY OF EVIDENCE

1. Various admissions by defendants Humphrey and Haas were read into the record. (Tr. 14-20). Defendants contracted for the televising of at least three commercials on a Des Moines station advertising legal services. Each of the commercials contained the following: more than a single non-dramatic voice, background sound, visual displays other than words and numbers, visual displays beyond that which is allowed in print under DR 2-101, a list of four fields of law practice, no disclaimer of the type required by DR 2-105(A)(3), statements relating to contingent fees without disclosure as to whether such fees would be computed before or after deduction of costs. Unless restrained defendants would continue televising such commercials. Prior to televising their commercials defendants did not seek advance approval from the bar association or the supreme court and did not request amendment of the Code of Professional Responsibility or changes in the relevant disciplinary rules.

2. Talmage Eugene Thompson, general sales manager for WHO-TV testified for plaintiff concerning the circumstances under which defendants' commercials were placed and run. (Tr. 22-36). He testified concerning his general duties as sales manager and stated that WHO's geographical viewing area was probably the forty counties surrounding Des Moines. In August 1982, a national sales representative firm contacted the station regarding commercials for defendants' law firm to run scattered throughout the day Monday through Thursday forty-seven weeks out of the year with rotation during the 9-5 time period to give the benefit of as many program possibilities as possible. Thompson testified concerning the demographic breakdown of the audience during that time period, stating that the viewing audience was approximately 35,000-40,000 homes. Between 9:00 A.M. and noon the largest group of viewers consisted of

adults 25 and over. That time period had a target audience of older females while a younger and different audience tuned in during the afternoon. Defendants' commercials were screened prior to airing and were run eleven times, in no particular order of rotation, during a four day period before airing was discontinued at the request of the bar association.

3. James Gritzner, an attorney formerly a partner in defendants' firm, testified for plaintiff concerning the firm's decision to purchase and air the television commercials. (Tr. 36-80). He testified generally concerning his background in both law and broadcasting and stated that after joining the firm in October, 1981 he handled mostly personal injury and workers' compensation cases with some business litigation. After receiving a solicitation by mail from a Denver firm that syndicates legal advertising the partners discussed the possibility of contracting for the Des Moines area rights to the television commercials produced by the Denver firm. He testified that he was unenthusiastic about advertising on television but went to Denver, viewed 24 to 30 sample commercials, and was unimpressed by their quality and disapproved of the samples' use of a "hook" or tag line stating "He's in your corner." The purpose of the "hook" or tag line was stated to be to generate trust on the part of the target audience of blue collar workers and to increase viewer awareness of such matters as the fact that there was no charge for an initial consultation and that cases would be taken on a contingent fee basis. It was hoped that the commercials would generate immediate phone calls to the number shown. Gritzner testified that he was uncomfortable with both lawyer advertising generally and the Denver firm's experience that use of TV commercials had caused an enormous increase in case load at the expense of more complex types of cases. The partners were aware that the TV commercials did not conform to the Iowa rules but thought that the rules were unenforceable as a result of a then-recent United

States Supreme Court decision and, as a result, decided to air the commercials in order to be first in the Des Moines market without attempting to seek a declaratory judgment that such commercials would be permissible. The time for airing was intended to reach hospitalized or sick persons looking for entertainment. The total cost of the package was estimated to be approximately $45,000 per year and included a right to refuse any commercial produced by the Denver firm that was deemed unsuitable. Gritzner received the first phone call generated by the commercials, which was of a crank nature. His discomfort and embarassment with the concept of televised lawyer advertising led him to disassociate himself from the firm shortly thereafter but he stated that in his opinion defendants were not motivated by greed and a desire to become a settlement mill but, rather, sought to promote growth of the firm, and that they were willing and able to take cases to trial.

4. Robert Allbee, attorney and former supreme court justice, testified for plaintiff concerning the supreme court's adoption of rules regulating televised lawyer advertising. (Tr. 80-102). He testified concerning his profesisonal background and appointment to the court and stated that the current Iowa advertising rules were designed to prevent purely emotional reactions and inadvertent or intended deception and that the court order adopting the rules resulted from general satisfaction with the report of the bar committee that studied the matter. Reasons for not permitting dramatization were clearly enunciated in the report (P. Exh. 14) and, in addition, there was a larger purpose of protecting the public from misunderstanding or misapprehension. The objective was to limit the available information to content that was objective and informative rather than dramatic, persuasive, or promotional.

5. Dr. Richard Haynes, officer of Frank N. Magid Associates, a Cedar Rapids media research and consulta-

tion firm, testified for plaintiff concerning preparation and results of a survey conducted for plaintiff in which reaction to defendants' commercials was tested. (Tr. 105-296). He testified generally concerning his professional background in the field of mass communications and techniques of assessing the impact of commercials on viewers. P. Exh. 6 is the firm's conclusion and findings with regard to the survey conducted for plaintiff while P. Exh. 5 is the actual data obtained in the survey. Cedar Rapids area residents selected by a random digit dialing telephone procedure were guided through a questionnaire before and after viewing defendants' commercials in a manner that the witness stated was in accordance with generally accepted standards of research science; a focus group discussion was used in conjunction with the questionnaire. Prior to viewing of the commercial responses indicated a somewhat negative image of the legal profession that was not notably enhanced after viewing of the commercials. The pre-viewing average qualitative opinion of the profession was accompanied by high expectations. Seventy-one percent of the survey respondents expected a lawyer to be trustworthy prior to viewing defendants' commercials (P. Exh. 2 and 7) while after viewing the commercials 14% thought that defendants sounded like people who would be trustworthy. The commercials were found to be informational about such matters as the name of the firm, its phone number, and the fact that initial consultation was without charge but an imagery problem was noted. On cross-examination relating to the validity and reliability of the survey it was noted that the commercials were not perceived as misleading or deceptive nor, in Haynes opinion, were dramatized television commercials inherently deceptive or evil. About one-third of those contacted actually participated in the survey and the number of unemployed or unskilled participants did not reflect the percentage of such persons in the Cedar Rapids area. Viewing of the commercials was done in a studio rather than at home

and there was no control group exposed to commercials in compliance with the Iowa advertising rules. On redirect examination, it was stated that the potential for misleading or misinterpreting TV commercials was greater with dramatization due to the emotional nature of the response.

6. Lori Andrews, research attorney for the American Bar Foundation and former staff director of the American Bar Association Commission on Advertising, testified for defendants concerning various studies relating to legal advertising and interpretation of the study results and relevant United States Supreme Court decisions. (Tr. 298-391, 408). She testified generally concerning her professional background and particular work in the field of legal advertising. Her testimony was in an individual capacity and not as a representative of any organization. As a result of a survey taken while she was staff director the ABA Commission on Advertising concluded that the public has a need for information about lawyers and the cost and availability of legal services and that advertising provided a means for meeting that need. Various surveys showed that that need was not adequately being met by either the organized bar's efforts to provide information to the public or lawyer referral services. Roughly two-thirds of survey respondents approved of lawyer advertising but survey results showed that lawyers have an image problem. She opined, based on survey results, that limits on legal advertising darkened rather than helped lawyers' image and that the public favored advertising including dramatization. She also opined that emotional appeals do not create a need for legal services that did not already exist. At least 44 states permit legal ads using dramatization, graphics, etc., and at least 43 permit background music, actors, and personal appearances while only one state other than Iowa limits the voice involved. At least 26 states require ads to be dignified while 21 allow legal advertising gen-

erally so long as it is not false, fraudulent, misleading, or deceptive, and no particular problems have been encountered enforcing such a rule. She testified that the number of lawyers engaging in advertising was growing steadily and that with regard to regulation of such advertising there was a trend toward simply prohibiting false, fraudulent, and misleading ads and away from use of a list approach such as Iowa's, which she opined to be unconstitutional. She further opined that Iowa's treatment of televised legal advertising would not be effective in helping the public become aware of either the availability of legal services or information about legal rights.

7. Jay Trucks, a practicing attorney from Michigan, testified for defendants concerning his use of TV commercials including those aired by defendants. (Tr. 392-407). Ater testifying generally concerning his professional credentials he stated that his use of commercials produced by the Denver firm with which defendants contracted caused a dramatic increase in his personal injury practice due primarily to an influx of new clients from low income groups who had previously been unaware and/or ill-educated concerning their legal rights and the availability of legal services. He had received no complaints concerning his TV commercials and had received little or no response from an ad he ran in the yellow pages.

8. John A. DeMay, a practicing attorney from Pennsylvania, testified for defendants concerning his use of commercials produced by the Denver firm. (Tr. 414-438). He testified generally concerning an influx of new personal injury clients from low income groups, many of whom had been unaware of their legal rights prior to viewing his television commercials. Each commercial aired generated five to seven calls and approximately one call out of ten resulted in a new client.

9. Norton Frickey, Denver attorney and head of the firm producing and syndicating the television commercials aired by defendants, testified for defendants concerning the operation of his business and the effect of his commercials. (Tr. 439-469). He testified generally concerning his professional background and development of the advertising service co-existing with his law practice. He estimated that he had 91 to 95 current clients of his legal advertising service and four years experience with television commercials. He testified that his commercials were effective and directed toward blue collar persons, and enhanced the credibility of the profession. His commercials attempt to break down the image of lawyers as stuffy persons through such means as using John Madden for a spokesperson.

10. Daniel B. Wackman, professor in the University of Minnesota school of journalism and mass communication, testified for defendants concerning perceived deficiencies in the survey conducted by plaintiff's witness Hayne. (Tr. 470-566.) He testified generally concerning his professional credentials and the publications he had authored. His opinion that the survey lacked validity was based particularly on the lack of a suitable control group and lack of a real world setting from which it would be appropriate to generalize results and the attempt to compare perception of defendants after view of their commercials with the perception of an ideal lawyer prior to viewing the commericals.

11. Mark A. Schulman, president of a public opinion and market research firm and former vice-president of the Louis Harris polling firm, testified for defendants concerning perceived deficiencies in the survey conducted by plaintiff's witness Hayne (Tr. 566-596). He testified generally concerning his professional background in political science and quantitative research, and stated that he presently conducts surveys for clients of various test markets. His opinion that the Hayne survey lacked va-

lidity was based on the allegedly unrepresentative nature of the sample group as well as the grounds previously stated by defendants' witness Wackman.

12. On recall defendants' witness Wackman testified that due to such factors as inattentiveness TV viewers are less susceptible than is ordinarily assumed to emotional appeals in commercials and that adults from lower socioeconomic groups, like children whom he had studied, had learned to be skeptical of emotional sales pitches. He stated that the decision-making process is different with regard to the purchase of products like toilet paper as compared to such products as legal services. (Tr. 598-652).

13. Gene W. Murdock, assistant professor of business administration at the University of Wyoming, testified for defendants concerning perceived deficiencies in the survey conducted by plaintiff's witness Hayne. (Tr. 653-757). He testified generally concerning his professional background, especially in marketing, including some experience in the marketing of legal services. His opinion that the Hayne survey was not valid was based on perceived inadequacy and bias of the questionnaire's response scales, allegedly poor research design, and lack of a control group. His opinion that the survey lacked scientific reliability was based on the allegedly unrepresentative nature of the sample group. He found inadequate basis in the survey for the conclusion that the respondents' opinion of lawyers diminished after viewing defendants' commercials. He opined that obvious dramatization may have less tendency to mislead viewers than more formal and official-looking ads of a type that would comply with the present Iowa rules. He testified that surveys indicated a negative attitude toward lawyers among those having little contact with them and that commercials of the type aired by defendants convey useful information. He testified, as had defendants' witness Wackman, that the decision-making process is different

when the product in question is legal services rather than a more impulsive sort of purchase such as toilet paper. He opined that emotional appeals in television commercials were not harmful. On cross-examination he testified that his doctoral research on marketing of legal services suffered from some of the same deficiencies he noted in the Hayne survey due to the limited resources available to him at that time.

14. Mark A. Humphrey, defendant Des Moines attorney, testified for defendants concerning the circumstances surrounding his firm's decision to purchase and air television commercials. (Tr. 758-801). He testified generally concerning his profesisonal credentials and the formation and development of his firm as it sought to focus primarily on practice in the areas of personal injury and workers' compensation. Before considering the use of television commercials the firm tried print ads which proved ineffectual and awaited both a United States Supreme Court decision in a lawyer advertising case and the Iowa bar's failure to change Iowa rules as a result of that decision. *In re R.M.J.*, 455 U.S. 191, 102 St.Ct. 929, 71 L.Ed.2d 64 (1982). He expressed concerns about potential clients unaware of matters affecting their legal rights such as statutes of limitation, and stated that the firm's decision to air the commercials without seeking bar approval was due to the following factors: frustration stemming from a previous unsuccessful attempt to obtain bar approval for a print ad that was ultimately not run, belief that Iowa would either change or not enforce applicable rules as a result of certain yellow pages ads that appeared to violate applicable rules without having prompted disciplinary proceedings, and interpretation of the *R.M.J.* decision as rendering Iowa's rules unconstitutional. He expressed a desire to advertise in the future to the fullest extent permitted by the first amendment.

15. Fredd Haas, defendant Des Moines attorney, testified for defendants concerning the circumstances sur-

rounding his firm's decision to purchase and air television commercials. (Tr. 803-836). He testified generally concerning his professional credentials and the formation and development of his firm. He testified that the firm had participated in the bar association's lawyer referral service with little effect and that, in his opinion, some yellow pages ads placed by other attorneys violated applicable Iowa rules. Responses to the firm's televised commercials were mostly from persons unaware of such matters affecting their legal rights as statutes of limitation. He testified that the yearly cost to the firm for the commercials would be upwards of $20,000, of which $10,000 would go to the Denver firm producing them with the remainder to WHO for air time. He testified that he maintained a continuing interest in issues relating to legal advertising and that the firm's business decision not to air TV commercials that would comply with the Iowa rules was due to a lack of resources to independently produce such a commercial and doubts as to the effectiveness of such a commercial. He testified that the firm had been advised by the bar association that no change in the Iowa rules was contemplated in the absence of a challenge to their validity.

Supreme Court, U.S.
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No. 84-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARK A. HUMPHREY AND FREDD J. HAAS
d/b/a HUMPHREY & HAAS,

Appellants,

VS

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,

Appellee

On Appeal from a Judgment of the Iowa Supreme Court

MEMORANDUM OF APPELLEE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION

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February 15, 1985

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QUESTIONS PRESENTED

1. Whether the state may regulate the use of certain techniques employed in lawyer electronic media advertising which are designed to appeal to the emotions, prejudice, likes or dislikes of the viewing public and which inhibit the exercise of an intelligent or rational decision making process in determining the need for and choice of an attorney.

2. Whether the state may require those who wish to extend the boundaries of lawyer advertising beyond that set by established discliplinary rules to submit to review through an administrative procedure so as to insure compliance with the state's interest in intelligent, rational decision making in determining the need for and choice of an attorney.

3. Whether the lawyer television advertisements in this case, through their design and marketing, violated the state's interest in rational, intelligent decision making in the determination of the need for and choice of an attorney.

4. Whether the lawyer television advertisements in this case misled or had the potential to mislead the viewing public regarding fees charged and expertise of the advertising law firm.

5. Whether legal services involving the handling of wrongful death, serious personal injury or workman's compensation cases are "routine legal services" within the meaning of *Bates vs. State Bar of Arizona* 433 U.S. 350 (1977).

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I
REQUEST FOR PLENERY CONSIDERATION

Appellee Hereby Requests the court to Grant Jurisdiction and Give Plenery Consideration to This Appeal

STATEMENT IN SUPPORT OF PLENERY CONSIDERATION

This case presents two questions of first impression the resolution of which are of vital importance to the Bench, Bar, litigants and the consuming public. Initially the appeal concerns the power of the State to regulate certain techniques employed in lawyer electronic media advertising. Secondly it concerns an administrative procedure designed to implement lawyer advertising utilizing what has been described as a "safe harbor" approach to lawyer advertising.

A. Electronic Media Advertising

Rule DR 2-101 (A) and (B) does not prohibit the use of the electronic broadcast media. It seeks to regulate certain methods or tools of persuasion employed in commercial radio and television advertisements. Dramatizations and emotional appeals targeting the prejudice, likes or dislikes of the viewing public are regulated[1] as being contrary to the articulated state interest that the public exercise an intelligent or rational decision making process in determining the choice of an attorney.[2] Both the state interest sought to be protected and the effect of dramatization and emotional appeal are supported in the factual testimony underlying the Iowa Rule.[3]

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[1]DR 2-101 (A) and (B) App. D. 28a-30a.

[2]Trans. 95. Testimony of former Justice Robert Allbee. See also *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) for judicial recognition of the validity of the state interest.

[3]Trial Ex. 16A.

In pertinent part, concerning lawyer electronic media advertising, Iowa Rule DR 2-101 (A)[4] states:

> "A lawyer shall not, on the lawyer's own behalf or that of a partner, associate or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory or unfair statements, which contains any statements or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, or likes or dislikes of a person or which contains any claim that is not verifiable; . . ."

In addition to the prohibition against appeals to the emotion, DR 2-101 (B)[5] makes the following regulation regarding use of the electronic broadcast media:

> ". . . The same information, in words and numbers only, articulated only by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio. The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer."

As identified in *Bates vs. State Bar of Arizona*, 433 U.S. 350, (1977) the "special problems of advertising on the electronic broadcast media will warrant special consideration." To date, on subsequent case has given condsideration to

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[4]DR 2-101 (A) App. D. 28a.

[5]DR 2-101 (B) App. D. 29a.

what, if any, limitations may be placed on electronic broadcast advertising by lawyers.

Since Bates, and its progeny, in Re R.M.J. 455 U.S. 191 (1982), most States have promulgated some form of regulation regarding lawyer electronic media advertising. The scope of the regulation, however, varies widely from state to state.[6]

In R.M.J., supra at 455 U.S. 205, this Court cited to Missouri's failure to support its regulation with an adequate record[7]. In response to the decision in Bates, supra, the Iowa Supreme Court conducted hearings and reviewed expert testimony which resulted in the promulgation of Iowa's DR 2-101 (A) and (B).[8] Unlike the record in R.M.J., supra., the regulation under consideration rests upon a foundation supported by fact and expert testimony.

In the case at bar, testimony was procured regarding the design intent of the Appellant's commercials . . . immediate

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[6]Appellants Jur. Stmt. pg. 9 fn. 14

[7]455 U.S. 206.

[8]Pursuant to direction of the Iowa Supreme Court, the Committee on Professional Ethics and Conduct of the Iowa State Bar Association is a Commission of the court. On December 13, 1979, a hearing was held and expert testimony was taken regarding the state interest sought to be protected by lawyer advertising and what, if any, restrictions should be placed upon unrestrained lawyer advertising so as to further the articulated state interest. The Iowa Supreme Court, en banc, at a public hearing, received the Committee's recommendation, the testimony introduced before the Committee and additional briefs and arguments from the public. After due deliberation, the Iowa Supreme Court promulgated Iowa's DR 2-101 (A) and (B). For a detailed factual recitation regarding the procedure and background of the Rule, see *Rapp and Gillium vs. Committee*, 504 F. Supp. 1092 (D.C. Iowa 1980).

response-reaction,[9] as well as their "targeted" audience . . . injured accident victims[10].

The Iowa Supreme Court, in upholding the Rule, concluded that all that was prohibited by the Rule was the use of methods, techniques and tools "which would manipulate the viewer's mind and will"[11]. Dramatization is the essential element for the use of these "tools"[12].

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[9]Dr. Richard Haynes. a Ph.D in mass communication and telecommunication research testified that the Appellant's commercials were designed around the concept of response-reaction or "per inquiry" like those used for selling records and the like, (Trans. p. 133) with the design intent to create an immediate reaction on behalf of the viewer to act and place a call. (Trans. 147.) Atty. James Gritzner of Appellant's law firm and with some measure of experience in the television broadcast industry (Trans. 37) testified that the design intent of their commercials was ". . . to prompt the viewer to make a phone call immediately." (Trans. 48) and that the reaction was facilitated by positioning and repetition: ". . . When that was flashed on the screen with the phone number, and the phone number repeated twice, that was designed, I believe, to promote those individuals to write it down or even better grab the phone and make a call." (Trans. 49)

[10]The specific target audience for the Appellant's commercials was pre-selected by their design to be injured accident victims' who may be watching television while in the hospital or home recouperating from an injury. (Trans. 458). The target audience concept was verified by the testimony of Mr. James Gritzner of Appellant's firm. (Trans. 57-58)

[11]Opinion, App. A. 31a.

[12]Trial Ex. 16a, pp. 64-70, expert witness testimony of Leonard J. Howe, executive director of Iowa Broadcasting Network. Mr. Howe testified that while there are dangers in any advertising, there are more dangers in the area of professional advertising. (Ex. 16a pp. 62). Regarding television, Mr. Howe testified that while the element of imagination is removed (as compared to radio) motion and all of the elements of drama are added ". . . so it is the ultimate in the dramatic or emotional form of the media" (Ex. 16a. pp. 67-68.) Mr. Howe further testified that while all three forms of communication—print, radio and television—can be abused, television, because it has more elements of drama, is the most abused. (Ex. 16a. p. 70).

This case presents the Court with the first opportunity to define the "special problems of advertising on the electronic broadcast media. . . ."[13] that were left unanswered by Bates, supra.

B. "Safe Harbor" Administrative Procedure

Rule DR 2-101 (B), (C) and (D)[14] establishes a listing of information that may be contained in lawyer advertisements. The Rule establishes a "safe harbor" regarding method and content for any lawyer about to voyage into the troubled sea of lawyer advertising.[15] Realizing, however, that no "safe harbor" list can be all inclusive, the Rule establishes an administrative procedure whereby advertisements, in form or content beyond that listed in the safe harbor itemization, may be authorized. Rule DR 2-101 (D)[16] establishes a procedure whereby any lawyer may extend the boundaries of the safe harbor. The Rule provides in part that:

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[13]Bates, supra at 433 U.S. 384.

[14]App. D 32a-33a.

[15]e.g. Rule DR 2-101 (B) 1-19 (App. D 29a-30a) permits the dissemination of information concerning fields of practice, place and date of birth, date and place of admission to the bar of the state and federal courts; schools attended, dates of graduation, degrees and other scholastic distinctions; public and quasi-public offices held; military service; legal authorships; legal teaching positions held; memberships, officer and committee assignment in bar associations; whether credit cards or credit arrangements are accepted; race, sex, religion or ethnic background. In general, it is a curriculum vitea approach to information relevant to the intelligent selection of a lawyer. Likewise DR 2-101 (C) 1-4 (App. D 30a-31a) permits the inclusion of information relative to the fees charged for "specific legal services" defined in DR 2-101 (D) (App. D 31a-32a) as abstract examinations, uncontested dissolutions, wills, income tax preparation, changes of name, leases, mortgages, bills of sale, and all other matters authorized in Bates supra. at 433 U.S. 372.

[16]App. D. 32a.

> ". . . the committee shall adopt regulations, subject to the approval of the supreme court, to provide a procedure to receive and consider such requests from lawyers, and for the prompt submission to this court of any appeal from a determination adverse to such request. Said committee may futher issue, subject to the approval of the supreme court, regulations further defining or describing "specific legal services" within the meaning of this rule."[17]

Consistent with the intent of the Rule, the Committee established Rule 5.1 of the Committee on Professional Ethics and Conduct[18] to facilitate the administrative process set forth in DR 2-101 (D).

Unless there are to be no boundaries on the method or content used in commercial advertisements by lawyers, some procedure administered by some tribunal must be established to implement rules on advertising. Rule 2-101(D) as implemented by Committee Rule 5.1 seeks to

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[17]DR 2-101 (D) App. D. 33a.

[18]Rule 5.1 Committee on Professional Ethics and Conduct states: "Any member of the bar desiring to expand the information authorized for disclosure pursuant to the provisions of DR 2-101 or DR 2-105, Iowa Code of Professional Responsibility for Lawyers, or to provide for its dissemination through forums other than therein authorized or otherwise to change those rules, may apply to the committee. Such application shall be made in writing by restricted certified mail, and shall include such documentation as the applicant deems appropriate. The committee thereafter shall determine, on the basis of documentation at hand, further investigation, or whatever hearings it deems to be necessary, whether all or any part of the proposal is necessary in the light of existing provisions of the code, accords with the standards of accuracy, reliability, and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services." The rule was approved by the Iowa Supreme Court by Court Order of May 18, 1978.

establish such an administrative procedure. In its opinion enjoining the Appellant's television commercials, the Iowa Court noted that Appellant's failed to follow the administrative procedure set forth in the Rule.[19]

This case presents to the Court its first opportunity to review an administrative procedure established to facilitate the growth of lawyer advertising.

WHEREFORE due to the importance of the issues to the litigants, the Bench, Bar and the consuming public Appellee joins Appellant and requests that the Court grant jurisdiction, give plenery consideration to the case and set the case for briefing and argument.

. . .IN THE ALTERNATIVE

II

MOTION TO AFFIRM

In view of Appellant's request for summary reversal and should the Court not grant jurisdiction and plenery consideration of this case, Appellee moves the Court to affirm the judgment of the Iowa Supreme Court.

STATEMENT IN SUPPORT OF ALTERNATIVE MOTION TO AFFIRM

As indicated in the Statement in Support of Plenery Consideration, the Iowa Supreme Court reacted to this Court's holding in Bates, supra. Hearings were conducted, expert testimony reviewed and oral arguments heard regarding the state interest sought to be fostered by lawyer advertising, the danger to the public regarding unrestrained lawyer advertising, and what restrictions, if any, should be placed upon lawyer advertising so as to minimize

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[19]Opinion, App. 8a-9a.

the potential dangers while fostering the state interest sought to be protected.[20]

DR 2-101 (A) and (B)[21] represent a valid time, place and manner restriction regarding the use of the electronic broadcast media. The four-part test of *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) has been satified.

Pursuant to Central Hudson, supra at 477 U.S. 566, initially Appellant's commercials may be granted protection if they concern a lawful activity and are not misleading.[22] However while the commercials concern a lawful activity the Iowa Supreme Court, after trial, found them to be misleading regarding the fees and expenses to be charged the client as well as the extent of the expertise claimed by the law firm.[23]

Likewise, under the second part of the Central Hudson four-part test, the governmental or state interest sought to be protected by time, place and manner regulation must be substantial.[24] The state interest sought to be protected by DR 2-101 (A) and (B), has been identified by the Iowa Supreme Court as rational, intelligent and voluntary decision making in determining the need for legal services and the selection of a lawyer.[25] This state interest was articulated

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[20]Trial Ex. 16a, Testimony before Committee; Testimony of Justice Robert Allbee, (Trans 87.)

[21]App. D. 28a-35a.

[22]Central Hudson, supra at 447 U.S. 566.

[23]Opinion, App. A. 10a-11a.

[24]Central Hudson, supra at 477 U.S. 566.

[25]Opinion, App. A. 13a.

by former Justice Allbee in his testimony during the trial of this case, and formulated the basis for the Rule itself.[26]

Whether the regulation directly advances the governmental interest, concerns the third part of the Central Hudson algorithm.[27] The effects of dramatizations resulting in the manipulation of the viewer's mind and will were the subject of expert testimony during the promulgation of the rule[28] as well as expert testimony produced during the trial of the case itself. Many witnesses testified regarding the design intent of these commercials as well as the audience that they targeted.[29] Commercials designed to manipulate the public to "grab the phone and make a call"[30] do not foster a rational, intelligent, and voluntary decision making process in determining the need for legal services, they simply manipulate the viewer.[31]

The last part of the Central Hudson test concerns the extent of the regulation and whether it extends beyond that which is necessary to serve the articulated state interest.[32] As the Iowa Court found, all that is prohibited are the tools, techniques or methods used to manipulate the viewer. Through the administrative process established by the

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[26]Testimony of former Justice Albee, (Trans. 87); Ex. 3.

[27]Central Hudson, supra at 466 U.S. 566.

[28]Trial Ex. 16a.

[29]Mr. James Gritzner of Appellant's law firm, a lawyer with expertise in television broadcasting, admitted that the design of the commercials was to ". . . prompt the viewer to make a phone call immediately." (Trans. 48) Likewise, the knee-jerk reaction design of the commercials was the subject of testimony by Dr. Richard Haynes (Trans, 147).

[30]Testimony of James Gritzner. (Trans. 49)

[31]Opinion, App. A. 13a.

[32]Central Hudson, supra at 477 U.S. 566.

Rule, new information other than that listed in the "safe harbor" itemization may be communicated and the bounds of lawyer advertising broadened. Commercial speech concerns the consumer's right to receive information and ideas regarding potential commercial transactions as compared to the lawyer's "right" to transmit the speech.[33] DR 2-101 (A) and (B) allow all information necessary to educate the consumer and assist in the rational, intelligent decision-making process. The rule attempts to protect the public from manipulation by taking away the tools necessary for its operation . . . drama and emotion. Without these potent tools, the manipulation of the mind, the implantation and preceived need, the immediate response-reaction and all of the other techniques and methods that are used to control the public's mind are powerless.

WHEREFORE Appellee moves the Court to affirm the judgment of the Iowa Supreme Court.

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[33]*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748 (1976).

CONCLUSION

Probable jurisdiction should be noted and plenery consideration given to the case. In the alternative, the Court should AFfirm the judgment of the Iowa Supreme Court.

Respectfully submitted,

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